

# **Pressures to Plead Guilty or Playing the System? : An Exploration of the Causes of Cracked Trials**

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## **ABSTRACT**

### **Pressures to Plead Guilty or Playing the System? : An Exploration of the Causes of Cracked Trials**

**Daniele Alge, The University of Manchester, PhD 2009**

This thesis is an empirical exploration of cracked trials at Manchester Minshull Street Crown Court. Cracked trials are cases which are listed for trial but on the day they are due to be tried are disposed of in some other way. The thesis presents quantitative and qualitative data extracted from prosecution case files, as well as interviews with legal professionals, to examine the reasons for cracked trials, focusing on those trials which crack as a result of a late guilty plea. The data are analysed in order to explore the features of cracked trials, and the defence lawyer's role in late guilty pleas (identified as significant by previous studies) is also examined.

The existing literature has identified plea bargaining as a significant cause of late guilty pleas; the extent to which this was a feature within the sampled cases is assessed, and the nature of the plea bargains which were present in the data is explored. It is argued that the data demonstrate that plea bargaining played a key role in those cases which cracked as a result of a late guilty plea and that several types of plea bargain were prevalent within the sample.

In light of these findings, the thesis analyses the reasons for the criminal justice system's reluctance to acknowledge the role of plea bargaining in cracked trials (despite some recent formalisation of plea bargaining itself), and examines the extent to which grounds for policy and academic objections to plea bargaining and cracked trials were evidenced in the data collected. The thesis then considers whether either policy objections (that cracked trials represent defendants 'playing the system') or academic objections, (that plea bargains create pressure on defendants to plead guilty, and cracked trials are a manifestation of that pressure) are necessarily true, and whether plea bargaining could alternatively be viewed as a legitimate consensual or contractual exchange of concessions.

The thesis concludes with the argument that a contradictory and hypocritical approach to plea bargaining has created a situation whereby the significance of plea bargaining is often ignored by a criminal justice system which has come to rely upon it. It is argued that the policies pursued in an attempt to reduce cracked trials are therefore flawed in their failure to acknowledge that cracked trials are inextricably bound together with plea bargaining.

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No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning

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Without the assistance of the Crown Prosecution Service (CPS) in granting me access to their files, it would not have been possible to conduct this study, and I am greatly indebted to John Holt, Chief Prosecutor for Greater Manchester and Mark McCartney for their facilitation of the research, as well as the many other individuals at the CPS who provided practical assistance. I hope that this study's findings will be of some assistance to the CPS and the Court Service in their endeavours to reduce cracked trials. This thesis would also not have been possible without the generosity and time of the lawyers, judges and court administrators interviewed for the study.

Kevin Dibdin at Her Majesty's Court Service Performance Directorate put considerable time into providing me with data in various formats throughout all stages of the research, and although it was not possible to make use of all of it, the effort was greatly appreciated.

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## INTRODUCTION

Cracked trials in the Crown Court are trials which, on the day the case is due to be tried (or any subsequent day of the trial before the jury retire to consider their verdict) are in fact not tried but are disposed of by other means; usually by a late guilty plea to either the original or alternative charges, or by the prosecution offering no evidence in respect of the case.<sup>1</sup> This is the definition of a cracked trial used by the Judicial and Court Statistics, although the term is often used informally by practitioners to refer specifically to cases which result in a late guilty plea. Cracked trials are a common feature of the criminal justice system and the most recent figures show a cracked trial rate of 42% (Crown court annual reports, 2006 / 2007)<sup>2</sup>. They are regarded by the court system and government as an inefficient use of valuable resources and in recent years, a range of measures has been implemented to reduce the frequency with which they occur. The overwhelming emphasis of these measures has been to encourage defendants to plead guilty at an earlier stage in their cases. Defendants pleading guilty 'at the door of the court' are often regarded as 'playing the system' in the hope that they will be able to secure a greater reduction in sentence or charges if they withhold their guilty plea until a later stage, when it will be 'worth more' to the prosecution (despite the fact that, in theory, greater discounts are awarded for early guilty pleas). Alternatively, defendants may withhold their pleas in the hope that the prosecution might, once at court, be forced to drop the case due to a lack of witnesses or other evidence. The government White Paper, *Justice for All* stated that one of the key steps in 'rebalanc[ing] the criminal justice system in favour of the victim and the community so as to reduce crime and bring more offenders to justice' should be 'new procedures which get the case to trial quickly, with reduced chances of the accused 'playing the system' and escaping justice if guilty' (2002, p.15), and this has indeed been the focus of a number of procedures since the enactment of the 2003 Criminal Justice Act.

Academic research and opinion paints, in large part, a very different picture of cracked trials. They are often regarded as the manifestation of pressures on defendants to plead

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<sup>1</sup> Cracked trials also include trials which do not proceed because the defendant is bound over to keep the peace, is unfit to proceed or is deceased. These types of cracked trials are relatively infrequent and the 2006 Judicial and Court Statistics show that in combination, these reasons accounted for 2% of cracked trials. No such cases were present in the research sample.

<sup>2</sup> Although 2007 / 2008 statistics are now available in the form of the Judicial and court statistics 2007 and Crown court annual reports for the year 2007 / 2008, where appropriate, figures from 2006 are referred to throughout the thesis as the data obtained for this study were from cases finalised in 2006.

guilty in that when faced with an impending trial, pressures from a variety of sources force defendants to 'crack' and change their plea to guilty in order to avoid the risk of the harsher penalties which would follow a conviction after trial (see for example Baldwin and McConville 1977; McConville et al. 1994; Belloni and Hodgson 2000; Darbyshire 2000, 2005; Ashworth and Redmayne 2005; Sanders and Young 2007). The various pressures, which this thesis will discuss, tend to come together at a relatively late stage in criminal proceedings, once all the evidence is available and the defendant has met his trial barrister. From a psychological perspective, the pressures of the situation may only become a reality for a defendant once a trial date is approaching, or has arrived.

The academic literature specifically on cracked trials in England and Wales is sparse, but includes the Crown Court Research Study carried out by Zander and Henderson for the 1993 Royal Commission on Criminal Justice (RCCJ, 1993) which presents primarily quantitative data relating to the administrative effect of cracked trials on court business, the Evaluation Report of the Joint Performance Management Pilot Scheme on Cracked Ineffective and Vacated Trials (2001) and Bedard (1992) which considers strategies for reducing the number of cracked trials. However, the literature on defendants' late guilty pleas more generally can also be drawn on, as late guilty pleas inevitably result in cracked trials, and several empirical studies have explored this area (notably McCabe and Purves, 1972; Bottoms and McClean, 1976; Baldwin and McConville 1977; McConville et al, 1994; Tague 2006, 2007). Baldwin and McConville's 1977 study *Negotiated Justice* remains the classic work in the area. Its core findings were that late guilty pleas were regularly the result of defence barristers pressurising their own clients to plead guilty, pressure which was often accompanied by an implicit or explicit plea bargain. McCabe and Purves (1972) and Bottoms and McClean (1976) had also found evidence of plea bargaining as a cause of late guilty pleas although the former differed from Baldwin and McConville in their moral evaluation of the practice and found no evidence of undue pressure and the latter did not criticise the practice as vehemently as Baldwin and McConville, although they were sceptical of McCabe and Purves' conclusions. McConville et al's 1994 study *Standing Accused* revisited the issue of legal advice and again found that defence lawyers (the focus was on solicitors) encouraged defendants to plead guilty, although most recently Tague (2006, 2007) puts forward findings which are in direct opposition to what has become almost a general consensus within the academic literature that defence barristers encourage their clients to plead guilty.

There is a vast body of literature on plea bargaining and the defence lawyer's role in

advising on guilty pleas in the USA, which is far more developed than the UK literature, both in quantity and in the variety of analytical approaches; primarily because plea bargaining is a more widely acknowledged element of the criminal justice system in the USA and has been for several decades. This thesis draws on some of the theoretical analyses of plea bargaining to have emerged from the North American literature, and does refer to key empirical findings where relevant, but to make direct comparisons between the mechanics and structure of plea bargaining in the two systems could be misleading.<sup>3</sup>

The focus of this thesis is on cracked trials which occur as a result of late guilty pleas. The reason for this is threefold. Firstly, on a practical level it was beyond the scope of an empirical doctoral thesis to explore both defendants' late guilty pleas and prosecution decision making. The intention is to explore cracked trials and plea bargaining from the defendant's perspective; his scope for playing the system, the pressures placed upon him, and his lawyer's role.

Secondly, this study explores issues which have been neglected to a certain extent and are in need of revisiting; in order to do this, the focus of previous studies in the area (that is, late guilty pleas) has been adopted to allow for some comparison with previous research. Thirdly, the policy response to cracked trials has focussed on those occurring as a result of late guilty pleas and an aspect of this thesis is to examine that policy response and the political context within which cracked trials operate. This is however not to say that trials which crack as a result of the prosecution offering no evidence are ignored; the same data were collected and are presented for all cases within the sample. There is a close relationship between what can be termed 'defence cracks' and 'prosecution cracks', as one

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<sup>3</sup> Key differences between the systems are that: (i) prosecutors in the USA are able to make recommendations of specific sentences, (ii) many offences carry minimum sentences in the USA, (iii) Judges often play a central role in plea bargaining in the USA, where as the decisions in *Turner* and *Goodyear* limit their role in England and Wales (iv) plea bargaining is an accepted and regulated aspect of criminal procedure in most US states, with accompanying guidelines (USAM United States Attorney Manual Chapter 9 – 16. In limited circumstances, US courts in some states will also accept pleas of guilty from defendants who maintain their innocence, known as 'Alford pleas' following the judgment in *North Carolina v Alford*, 400 U.S. 25 (1970). In *McKinnon v United States* [2007] EWHC (Admin) 762 at para. 60, the Divisional Court expressed 'cultural reservations' about the American system of plea bargaining. It should be noted, however, that since the enactment of ss110 and 111 of the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A), and s.51A of the Firearms Act 1968, as amended by s. 287 of the Criminal Justice Act 2003, a limited number of mandatory minimum sentences have been introduced in England and Wales, with the effect that if prosecutors choose to charge an offence as one which would attract a mandatory sentence, there is in effect a minimum sentence for that offence.

case can comprise of guilty pleas to some charges, and the prosecution offering no evidence to others. Moreover, the way in which the proportion of defence to prosecution cracks is presented by policy makers (that defence cracks are seen as occurring most frequently and as being at the root of the ‘problem’ of the cracked trial) is of considerable relevance to this thesis.

The research on cracked trials and plea bargaining in England and Wales, as well as on their relationship, is underdeveloped. There has been some recent work published although it draws very different conclusions to previous studies and so raises further questions (Tague 2006, 2007). The directly applicable literature is sparse, outdated to a certain extent, and varied in its approach and conclusions. It raises many questions about the causes of cracked trials, and the role of plea bargaining within them. This is particularly pertinent at a time when the criminal justice system has become ever more efficiency orientated and measures are being introduced to reduce cracked trials at local and national levels, despite little evidence of their underlying causes. This thesis explores these issues and presents the findings of an empirical study of the prosecution case files of 151 defendants in 119 cases listed for trial at Manchester Minshull Street Crown Court, and interviews with ten legal professionals. In doing so, it highlights the gulf between the current policy approach to cracked trials and the realities of their causes. This study takes the approach that the ‘causes’ of cracked trials are primarily the administrative processes and dynamics which lead to a trial cracking, but that these are themselves multi-layered. For example, a late guilty plea or a prosecution decision to offer no evidence might be the recorded cause of a cracked trial and the first stage in explaining why a particular trial cracked, but there may be underlying issues such as a reduction in the charges due to a lack of evidence, or witnesses not attending, which could be regarded as the underlying procedural causes. This thesis examines both layers of explanation, as well as their relationship to each other, in order to learn more about cracked trials and their interplay with plea bargaining.

In order to contribute to the research in this area, this thesis therefore has four core aims: (i) to examine the causes of cracked trials; (ii) to assess the extent to which plea bargaining is a feature of cracked trials; (iii) to explore the nature of plea bargaining in the Crown Court; and (iv) to examine the policy response to cracked trials and plea bargaining and place it within the broader context of current criminal justice policy.

It achieves these aims in part by exploring existing data but primarily (as existing data is limited), by presenting and analysing the findings of an empirical study of cracked trials and

plea bargaining at Manchester Minshull Street Crown Court. The existing administrative data compiled by the courts provide a starting point from which to examine the causes of cracked trials and show that, in 2006, 39% of cases nationally resulted in cracked trials (Judicial and Court Statistics, 2006). These same statistics also show that in 64% of these cases, the trial cracked as a result of the defendant pleading guilty, in 16% of cases as a result of the prosecution offering no evidence and in 18% of cases as a result of the prosecution accepting a guilty plea to an alternative charge. There are, however, inconsistencies within the administrative data which cast doubt over the accuracy of these figures. The utility of the administrative definition of cracked trials, and the validity of the statistics which indicate that cracked trials are caused primarily by defendants' late guilty pleas are called into question in the light of this study's empirical findings. The research also explores a range of other features of the cases sampled to assess whether they may have had an impact on the cases cracking.

The thesis examines the extent to which plea bargaining is a feature of cracked trials by analysing the data gathered on cracked trials within the sample, particularly those caused by late guilty pleas, and by exploring the views recorded in interviews with legal professionals. The features of cases which were indicative of plea bargains having taken place (such as charge reductions or indications as to the maximum sentence to be imposed following a guilty plea) are explored in detail, and the extent of these cases as a proportion of the entire sample is assessed.

Having established the extent to which plea bargained cases featured within the cracked trials investigated, the thesis moves on to explore the nature of those cases in order to put forward arguments as to the nature and scope of plea bargaining in the Crown court. Drawing on the existing literature, and on this study's findings, four different types of plea bargain are identified and explored: sentence bargains arising from sentence canvassing, sentence bargains arising from the operation of the sentence discount, charge bargains and fact bargains. The wider context within which the practice operates is explored by evaluating how plea bargaining and cracked trials relate to the aims and objectives of criminal justice policy more broadly.

The thesis is divided into five chapters which, in combination, serve to achieve the aims of the thesis in the manner set out above. The primary purpose of Chapter 1 is to review the literature and explore the debates surrounding cracked trials and plea bargaining as they currently stand. The existing administrative data on cracked trials are analysed and the



criminal justice system's response to (and expectation of) the problem of the cracked trial, including the operation of the sentence discount principle, is analysed in terms of its utility and underlying rationale. The previous empirical research on plea bargaining is outlined, and the chapter also addresses the traditional justifications for, and criticisms of, plea bargaining which underlie the academic perspectives on plea bargaining. Chapter 1 also provides a discussion of recent criminal justice policy, including its failure to consider plea bargaining as at least a potential cause of cracked trials (even though plea bargaining itself has received some limited acknowledgement and formalisation in recent years).

Chapter 2 explains the methods employed to carry out the study's empirical research and discusses the benefits which flowed from the methods selected and from combining quantitative with qualitative methods. A quantitative analysis of Crown Prosecution Service (CPS) court files generated statistical data, and the addition of qualitative data from the files, as well as qualitative interview data allowed for the data as a whole to be analysed with greater depth and context than would otherwise have been possible. Chapter 2 also addresses the methodological problems which were faced during the completion of the study and considers the ethical issues which arose in the research design.

Chapter 3 considers the issues surrounding the role of defence lawyers (barristers in particular) in plea bargaining and cracked trials. It analyses the relevant legal and ethical framework, the significance of working relationships and reputation, attitudes towards defendants and remuneration. In doing so, it develops the existing literature, which has not yet considered these factors in combination. Where possible, the chapter also evaluates qualitative data arising from interviews in order to add to what is known about the role of the defence lawyer in advising on late guilty pleas. This is an area which has repeatedly been identified as significant by previous literature (for example: Bottoms and McClean, 1976; Baldwin and McConville, 1977; McConville et al, 1994; Tague, 2006; 2007) and this study's findings indicate that the way in which legal professionals view defendants' late guilty pleas and cracked trials more generally, as well as defence lawyers' perceptions of their own roles, is of fundamental importance in understanding cracked trials and plea bargains.

Chapter 4 presents the quantitative findings of this study, alongside the qualitative data from CPS case files (with the exception of any data relating to lawyers). It includes data on the features of cracked trials including the defendants within the sample, their offences, the

outcomes of their cases, the evidence against them, the use of *Goodyear*<sup>4</sup> indications and whether there appeared to be offers or agreements to plead guilty within the case; in doing so it contributes to the empirical findings in an under researched area.

Chapter 5 analyses and interprets the data presented in Chapter 4 and assesses the extent of plea bargaining's role as a cause of cracked trials within the sample. It is argued that the 'problem' of the cracked trial is broader than commonly suggested, as although only 49.6% of the sample were defined as cracked trials under the currently adopted administrative definition, at least one individual count *within* the case 'cracked' in 72.2% of cases. Chapter 5 therefore puts forward a distinction between the former (recorded cracked trials) and the latter (informal cracked trials). The data, both quantitative and qualitative, highlight a range of features within the cases sampled as having a potential bearing on cracked trials or plea bargaining, and these features are explored. The chapter also challenges assumptions about the causes of cracked trials being predominantly a result of the defence or defendant's decisions. A further contribution this chapter makes is to consider the nature of plea bargaining as currently practised in the Crown court, and whether the cracked trials and plea bargains observed justified the opprobrium with which they are viewed by policy makers and academia respectively. It is concluded that in many of the cases sampled, although plea bargains were certainly present, they were neither necessarily the product of defendants playing the system, nor of pressures to plead guilty. The chapter therefore also considers the validity of alternative conceptualisations of plea bargains as legitimate consensual or contractual exchanges.

Throughout this thesis, the question of whether particular policies, regulations, practices and individuals' cases are indicative of scope for defendants to play the system, or of pressures upon defendants to plead guilty, is considered. Evaluating if either were, or could be, present, necessarily involved some degree of subjective judgement. For example, determining whether an offer of a reduced charge from the CPS is a pressure to plead guilty to the reduced charge, or a means by which a defendant can play the system and escape a conviction for the more serious charge, could be a moot point in the absence of any reliable data from the defendant himself as to how he perceived the offer. However, despite the absence of such data in the present study, on an individualised case level, it was often possible to make an informed judgement. For example, where there appeared from the file to be a lack of evidence to the original charge, then a guilty plea to a lesser charge

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<sup>4</sup> [2005] EWCA Crim 888

should not, it is submitted, be seen as the defendant playing the system. If there appeared to be a lack of evidence to even the reduced charge, but the defendant nonetheless entered a guilty plea, a judgement could be made that there were some pressures extraneous to the evidence against the defendant which induced him to enter a guilty plea.

When considering policies such as the sentence discount which operate on a systemic rather than (or in addition to) an individual case level, it was also possible to make judgements based on a consideration of the likely effects of the policy and where available, the findings of any existing literature. Moreover, a core conclusion of this thesis is that plea bargaining is a richly layered and multi-faceted practice, and this necessarily means that competing interests and pressures will coincide. There may be tensions between the individualised and systemic factors involved in late guilty pleas. By way of illustration, a defendant may feel under considerable pressure to plead guilty as a result of the sentence discount, but on an individual level, could still feel that he has 'played the system' (benefitted in some way, at the expense of a 'just' outcome in terms of the sentence, the offence or the effect on victims) by pleading guilty to a lesser offence than the one with which he was originally charged, and knew himself to be guilty of. It is therefore not always possible to evaluate whether a particular feature of cracked trials or plea bargaining operates as a pressure to plead guilty or as scope to play the system in every given situation, because the same features have the potential to operate with different effects in different cases. Nonetheless, where possible, this study attempts to identify and evaluate both individual and systemic pressures, and potential to play the system, by drawing on the data collected and the existing literature to consider the likely effects of the relevant factors, and having regard to situations in which there could be multiple effects.

In conclusion, this thesis demonstrates that the assumptions upon which the criminal justice policy response to cracked trials rests are flawed. There is little evidence to support the proposition that defendants deliberately 'playing the system' are a significant cause of cracked trials and it is argued that it is in fact lawyers, if anyone, who have more to gain from 'playing the system'. There is however a great deal of evidence to suggest that plea bargaining is widespread and plays a pivotal role in cracked trials; at times creating an institutional pressure on defendants to enter a guilty plea. It is argued that the criminal justice system's increasing provision of inducements to defendants to plead guilty, when coupled with a failure to consider the full impact of plea bargaining, despite some recent formalisation of the practice, makes for a hypocritical and disjointed approach both to cracked trials and to plea bargaining, which may pose a greater threat to due process than

the practice of plea bargaining itself.

## **CHAPTER 1**

### **CRACKED TRIALS AND PLEA BARGAINING IN ENGLAND AND WALES: AN ANALYSIS OF THE ISSUES**

#### **1.1 Introduction**

This chapter provides an analysis of the literature and debates which provide the context for this study. It examines the prevalence of cracked trials, their recorded causes, and outlines the difficulties cracked trials are perceived to create within the criminal justice system. The potential relationship between cracked trials and plea bargains is discussed, as are the methodological problems faced by anyone attempting to define or quantify plea bargains, particularly in the light of their relationship with cracked trials. The relevant literature is reviewed, and the features of the criminal justice system which are identified as giving rise to late guilty pleas and plea bargaining (thus leading to cracked trials), such as the sentence discount and sentence indications, are discussed. The chapter concludes with the argument that given the importance criminal justice policy places on reducing cracked trials, it seems illogical that their causes have not been meaningfully investigated. Despite some recent policy engagement with plea bargaining, the possibility of its relationship with cracked trials (as highlighted by research on late guilty pleas by Bottoms and McClean 1976; Baldwin and McConville 1977; Hedderman and Moxon 1992; Zander and Henderson 1993) has been neglected. Courts and policy makers have instead chosen to maintain what has become an increasingly fragile fiction that plea bargains have no place in English criminal courts.

#### **1.2 Outlining the ‘problem’ of the cracked trial**

As stated in the introduction to this thesis, a cracked trial is a case in which ‘on the trial date, the defendant offers acceptable pleas or the prosecution offers no evidence. A cracked trial requires no further trial time...’ (Judicial and Court Statistics 2006, p.103). By far the most common recorded reason for a cracked trial is that the defendant enters a guilty plea to the original charge(s), as was the case in 64% of cracked trials in 2006. In 18% of cracked trials in 2006, the trial cracked when the prosecution accepted a plea of guilty to an alternative charge. Other reasons were that the prosecution offered no evidence (16% in 2006) or that the defendant was bound over to keep the peace, or was unfit to proceed, or deceased. The cracked trial is one of three possible trial outcomes; the other two being an

effective trial, or an ineffective trial. An effective trial is one which goes ahead and results in the defendant being convicted or acquitted by a judge or a jury. An ineffective trial differs from a cracked trial in that the case has not been disposed of in an ineffective trial, and provided that the problem which led to it being ineffective can be resolved, it will be listed again at a later date. Common reasons for ineffective trials, which in 2006/2007 accounted for 12% of all listed trials (see Crown Court Annual Reports 2006/2007) are: key witnesses failing to attend, the defendant failing to attend, or issues with trial readiness on the part of either the defence or the prosecution (the Judicial and Court Statistics 2006 provide a detailed breakdown at pp. 103 – 104).

The cracked trial is a common feature of the court system and, during the past four years, the percentage of cracked trials as a proportion of all listed trials first approached, then exceeded 40%, as Fig. 1.1 illustrates.

Fig. 1.1: England and Wales average cracked trial rates 2000 - 2008<sup>5</sup>

<b>Year</b>	<b>Percentage of trials cracked (%)</b>
2000 – 2001	23.4
2001 – 2002	24.2
2002 – 2003	24.5
2003 – 2004	38.3
2004 – 2005	39.2
2005 – 2006	38.0
2006 – 2007	39.0
2007 – 2008	42.0

Fig. 1.1 also shows that there was a significant rise in the proportion of cracked trials which appeared to occur during the course of the 2003 – 2004 year, and the rates in subsequent years have remained at a comparable level. There has been no corresponding rise in the overall number of cases committed for trial at Crown Courts, and no apparent change in the way cracked trials are recorded or defined.<sup>6</sup> There have been developments in the past

<sup>5</sup> Figures taken from the relevant Crown Court Annual Reports, published by the Department for Constitutional Affairs, and since 2006 by the Ministry for Justice. It was not possible to obtain statistically comparable figures for years prior to 2000.

<sup>6</sup> Cases committed for trial at the Crown Court between 2001 and 2006:

2001: 54,310

2002: 51,672

2003: 51,837

2004: 48,943

2005: 48,340

decade which may have had an effect on the proportion of cracked trials: the introduction of ‘plea before venue’ for either way cases in 1997, new legislation (the 2003 Criminal Justice Act in particular), changes to the Bar’s fee structure, such as the introduction of the Revised Advocacy Graduated Fee Scheme (RAGFS) in 2007, and schemes such as the Effective Trial Management Programme (ETMP). Even in combination though, these factors inadequately explain the sharp rise in 2003 – 2004, and indeed many of the relevant developments have taken place since 2003. That year is also the first year in which each Crown Court was required to provide a detailed breakdown of statistics relating to that individual court, rather than the shorter summaries published in the previous three years. This may be relevant as it is possible that there was an accompanying change in recording practices, although having spoken to court administrators at both Manchester Crown Courts and a civil servant in the Business Information Division of Her Majesty’s Court Service Performance Directorate, it appears that recording practices remained consistent across the period in question.

These inconsistencies in the data become yet more puzzling with reference specifically to Manchester’s cracked trial rates, of particular interest as Manchester Minshull Street Crown Court cases were those sampled for this study. It is important to note that Manchester has relatively high cracked trial rates (discussed below, and not an inconsistency in itself); but the rates recorded by the Annual Crown Court Reports for the years 2000 to 2003 differ considerably to the rates for those same years as published by more the recent, detailed Court Reports compiled by Manchester Minshull Street and Manchester Crown Square Crown courts (the previous years’ figures are provided within the reports as a comparison). Figs. 1.2 and 1.3 below set out the discrepancies for Manchester Crown Square and Manchester Minshull Street Crown Courts respectively, by tabulating the percentages of cracked trial rates as published by the two sets of reports:

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2006: 47,059

(Source: Judicial and Court Statistics 2006, Table 6.1).

Each of the Annual Court Reports (which were first published for the 2000 – 2001 year), and the Judicial and Court Statistics define any case that is dealt with on the day a trial was scheduled to take place, but without the trial going ahead, as a cracked trial.

Fig.1.2: Manchester Crown Square Crown court published cracked trial rates 2000 – 2008

<b>Year</b>	<b>Crown Square cracked trial rate, as published in 2000–2003 Annual Reports (%)</b>	<b>Crown Square cracked trial rate, as published in 2003–2007 Annual Reports (%)</b>	<b>Difference between published cracked trial rates (%)</b>
2000/2001	33.9	42.1	<b>8.2</b>
2001/2002	30.0	41.3	<b>11.3</b>
2002/2003	32.6	47.2	<b>14.6</b>
2003/2004	n/a	49.2	n/a
2004/2005	n/a	54.0	n/a
2005/2006	n/a	49.0	n/a
2006/2007	n/a	48.3	n/a
2007/2008	n/a	50.5	n/a

Fig. 1.3: Manchester Minshull Street Crown court published cracked trial rates 2000 - 2008

<b>Year</b>	<b>Minshull Street cracked trial rate, as published in 2000-2003 Annual Reports (%)</b>	<b>Minshull Street cracked trial rate, as published in 2003–2007 Annual Reports (%)</b>	<b>Difference between published cracked trial rates(%)</b>
2000/2001	34.6	47.5	<b>12.9</b>
2001/2002	31.7	45.5	<b>13.8</b>
2002/2003	35.8	49.7	<b>13.9</b>
2003/2004	n/a	53.0	n/a
2004/2005	n/a	52.6	n/a
2005/2006	n/a	53.1	n/a
2006/2007	n/a	48.9	n/a
2007/2008	n/a	53.2	n/a

Other than an administrative error, or a failure of individual courts and the then Department for Constitutional Affairs (DCA) to synchronise their recording practices, there appears to be no explanation for this anomaly. Lord Justice Leveson’s introduction to the 2006/2007 series of Annual Reports states (at p.2) that ‘real problems’ in relation to the accuracy of statistical information had been reported, although no reference is made to cracked trial rates specifically.<sup>7</sup>

<sup>7</sup> The 2006 Judicial and Court Statistics published by the Ministry of Justice contain the following caveat, which may also have some bearing on these inconsistencies: ‘The Ministry of Justice publications ‘Criminal Statistics 2006’ (CS) and ‘Judicial and Court Statistics 2006’ (JCS) both contain data on the number of proceedings heard in the Crown Court. However, while both sets of figures are produced from the same core source (the CREST system used to administer Crown Court cases), they are not directly comparable as there are known differences between them. These are due to a number of factors, including



One conclusion which can reliably be drawn from these statistics, despite the inconsistencies, is that both Manchester Crown Courts have had consistently higher rates of cracked trials than the national average, and Lord Justice Leveson, the Senior Presiding Judge for England and Wales, expressed his concern that the North West of England has cracked trial rates well above the national average (Crown and County Courts Annual Report 2006/2007, p.5) and cracked trial rates increased again during the 2007 / 2008 year, at both of Manchester's Crown courts. Manchester's high cracked trial rates are, however, not out of the ordinary when set against those from the relatively comparable Crown Courts (that is, busy urban court centres) at Birmingham, Liverpool, Leeds, Nottingham or Sheffield, as Fig. 1.4 below demonstrates:

Fig. 1.4: Cracked trial rates 2006 – 2007; Manchester Crown Courts and comparable court centres

<b>Court</b>	<b>Cracked trial rate, 2006–2007 (%)</b>
Manchester Minshull Street	48.9
Manchester Crown Square	48.3
Birmingham	48.5
Leeds	51.8
Liverpool	45.7
Nottingham	44.6
Sheffield	57.7
England and Wales average	39.0

Despite the absence of any conclusive evidence on the effects of cracked trials, they are viewed as a challenge to the criminal justice system by policy makers and court administrators. Manchester Crown Courts have achieved considerable success in reducing ineffective trial rates, but cracked trials appear to present an ongoing problem, even for court centres with measurable achievements and improvements in case management.<sup>8</sup> The perceived costs incurred by cracked trials, seen as wastage by the government, are a primary concern for criminal justice managers. Figures from the then Department for Constitutional Affairs estimate that every cracked Crown Court case costs £1608 in lost

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differences in the data collation mechanics and the counting and validation rules used...’ (p.97).

<sup>8</sup> Manchester Minshull Street Crown Court reduced its ineffective trial rate from 27.4% in 2002 to 13.5% in 2007, and Manchester Crown Square Crown Courts reduced its ineffective trial rate from 21% to 14% in the same period, with both courts demonstrating consistent, year on year reductions (Crown Court Annual Reports 2006/2007).

and wasted court time (DCA, 2005). A raft of measures has accordingly been introduced, predominantly since the mid to late 1990's in order to reduce the number of cracked trials and their associated costs.<sup>9</sup>

One tool which has been employed to reduce cracked trials is the Plea and Case Management Hearing (PCMH), (previously the Plea and Directions Hearing (PDH)), introduced to all Crown Court cases in 1995. One purpose of this pre-trial hearing is to elicit an indication of plea from the defendant. If the defendant wishes to plead guilty, the judge can proceed to sentencing there and then. If no guilty plea is entered, the judge, with assistance from counsel, ascertains the likely issues in the case and gives any necessary directions. Defence counsel is obliged to complete a standardised form, the first question of which is 'Has the defendant been advised about credit for pleading guilty?' (The Consolidated Criminal Practice Direction, Annex E). It is clear that the courts are keen to sift out those cases which would potentially result in cracked or ineffective cases if they were allowed to proceed to trial. On a local level, Crown Courts have also been encouraged to manage their case loads proactively in order to more accurately identify potential cracked trials before they occur. One such measure was a 'Good Practice: Cracked and Ineffective Trials' pamphlet published in 2006 by Her Majesty's Courts Inspectorate (HMCI), outlining ways in which courts could reduce their cracked and ineffective trial rates. One suggestion (at p.2 of the guide) was removing financial disincentives for the defence to resolve cases early, by listing cases identified as potential cracks for mention pre-trial, and paying the defence advocate the cracked trial or first day of trial rate (a higher rate than that which would usually be paid if a guilty plea was entered at a pre-trial stage) if the trial cracked at this earlier hearing. The pamphlet suggests that courts should identify those types of cases which 'are more prone to cracking' and gives the examples of public order and domestic violence offences (at p.1). It illustrates how grave a problem cracked trials are perceived to be, and also assumes that defence lawyers have financial incentives to allow or to encourage

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<sup>9</sup> The Evaluation Report of the Joint Performance Management Pilot Scheme on Cracked Ineffective and Vacated Trials (2001) reported on a form to be completed by court staff and defence and prosecution advocates detailing the reasons for the crack, which is now in use as the Cracked and Ineffective Trial Monitoring Form (known as a CITM). The evaluation report recommended some amendments to the form to make it reflect more accurately the reasons for trials cracking, so that the forms might be a useful tool in monitoring (and ultimately reducing) cracked trials. However, although the forms are in use, whilst carrying out this research, I was told on several occasions by court staff and CPS case workers that they were rarely completed in sufficient detail to be of any assistance, and although there should, in theory, be a copy of the CITM form kept alongside the case files of cases which have cracked, they were only present in four of the 119 case files I had sight of for this study.

a case to proceed initially, but then crack on the date listed for trial. Tague (2006, 2007) has argued that even under the Graduated Fee Scheme (GFS) for barristers, as amended in 2005 and revised in 2007 to become the Revised Advocacy Graduated Fee Scheme (RAGFS), this is not necessarily the case, and that there are other competing incentives for lawyers, such as developing a reputation for good advocacy and winning rather than negotiating cases, which may be more powerful.<sup>10</sup>

A striking feature of the way in which criminal justice policy has responded to the cracked trial is the assumption that cracked trials are more often than not caused by the deliberate actions (or inaction) of defendants and/or their lawyers. Lord Justice Auld refers to the ‘uncooperative or feckless defendant and/or his defence advocate who considers that the burden of proof and his client's right to silence justifies frustration of the orderly preparation of both sides' case for trial’ (Auld Report, 2001, para. 9). This view appears to be widely held: the Courts Inspectorate pamphlet mentioned above suggests that court managers should analyse cracked trials in terms of the presence of specific defence solicitors or chambers involved (having first informed the solicitors or chambers) then check with other local courts to establish whether those firms or chambers have high cracked trial rates there too. If so, the pamphlet recommends forwarding the results to the Criminal Defence Service (HMCi 2006, p.2). The reasoning follows that if the defence have no financial incentives to hold off a guilty plea until the trial, and would in fact be sanctioned for doing so, cracked trial rates will fall. This begs the question of whether defendants or defence lawyers should bear any responsibility for the administrative expediency of the criminal justice system. The Code of Conduct for the Bar of England and Wales states that ‘A practising barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the court in the administration of justice...’ (8<sup>th</sup> edn., 2004, para 302). (The ethical dilemmas inherent in this overriding responsibility to the court and the court’s goals, rather than to the client, are discussed at Chapter 3). Defendants are bound by no such code though, and to require defendants to take part in the smooth running of their own trials is both cynical and naïve.

Furthermore, the assumptions upon which the Auld report’s reasoning rests are by no means supported by overwhelming evidence. The report of the 1993 Royal Commission on Criminal Justice states authoritatively that ‘the most common reason for defendants delaying a plea of guilty until the last minute is a reluctance to face the facts until they are at

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<sup>10</sup> See Chapter 3 for further discussion of Tague’s research, and (dis)incentives for lawyers to ‘crack’ trials generally.

the door of the court' (RCCJ, 1993, p. 111, para. 45). The Royal Commission, however, had commissioned a study of the Crown Court, but appear to have neglected the fact that that study, when questioning defence solicitors, found that in only 6% of cases where there was a late notification of plea was the reason given that the defendant had changed his mind. The most common reasons were that an earlier consultation with the client was impossible or had not taken place (31%) or that there had been a change in the prosecution's approach (28%) (Zander and Henderson 1993, p.148).

Even the assumption that cracked trials create serious problems is not beyond question. Zander and Henderson's Crown Court study found that 81% of judges surveyed said none of their court time was wasted as a result of cracked trials (1993, p.154). Particularly at large court centres, there will be sufficient 'floating' cases (cases which are not listed for a particular time or court room, but which are placed on a waiting list to be heard that day, on the assumption that some cases will crack and courts and court staff will become available) on the list to be heard if a court room and judge become available. Of course, this only takes into account one kind of wastage and does not take into account the inconvenience to victims and other witnesses, which the Royal Commission gave particular weight to.<sup>11</sup> Even prosecutors were not necessarily of the view that cracked trials presented a problem for the efficient running of the courts. Sixty-four per cent felt that cracked trials were 'good', and 34% that they were 'satisfactory' (Zander and Henderson, 1993, p.156).

Undoubtedly, a high proportion of trials crack, and this is viewed as a significant challenge for court administration, regardless of the fact that some research suggests that the effects of cracked trials need not necessarily be viewed as a problem. It is nonetheless true that even if floating trials are ready to fill the gap in the court lists, thereby minimising the time and money 'wasted' by cracked trials, the time of victims and other witnesses is still wasted, and a great deal of time and resources may have been expended preparing the case for trial. The assumption that 'feckless' defendants, or 'uncooperative' defence lawyers cause cracked trials is, however, unsubstantiated and there is insufficient evidence for the assumption to be held out as fact. The underlying assumption that defendants cause cracked trials is therefore assessed and challenged throughout this thesis.

One of the most notable means of encouraging guilty pleas has always been the sentence

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<sup>11</sup> 'Cracked trials create serious problems, principally for all the thousands of witnesses each year...who come to court expecting a trial only to find that there is no trial because the defendant has decided to plead guilty at the last minute' (RCCJ, 1993, p. 111, para. 45).

discount, and in 1980 *Boyd* clarified that ‘...the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty’.<sup>12</sup> The current structure of the sentence discount should in theory provide defendants with an incentive to plead guilty early, before the case comes to trial, and the section below examines the operation of the sentence discount and the graduated sentence discount introduced by the Sentencing Guidelines Council (SGC) in 2004.

### 1.3 The sentence discount

The sentence discount occupies a unique and paradoxical position in relation to cracked trials: it is both a cause of cracked trials and a measure used in an attempt to reduce them. It is a cause of cracked trials because it encourages guilty pleas, and if these guilty pleas occur at a sufficiently late stage, a cracked trial results. That the sentence discount explicitly encourages and rewards guilty pleas is undeniable. It has been an established convention of sentencing that a guilty plea will attract a discount of around one third on the punishment which would have been imposed following conviction upon a not guilty plea.<sup>13</sup> The rationale has traditionally been that the defendant is rewarded for saving the time, expense and trauma to the victim of a trial, but primarily that it rewards remorse. In reality, it operates to punish those who exercise their right to a trial. The case law on sentence discounts is relatively clear. In *Cain* it was stated that it was trite to say that in general terms a guilty plea would attract a lesser sentence than a plea of not guilty after a full-dress contest on the issue. The court stated that there was no doubt about this and accused persons should be made aware of it, the sooner the better.<sup>14</sup> This was described by McConville as the ‘most celebrated statement of the overriding importance of administrative considerations’ in criminal justice (1998, p.564). *Cain* was affirmed in 1980 by *Boyd*.<sup>15</sup>

In 1994, the sentence discount principle was consolidated on a statutory basis by s.48 of the Criminal Justice and Public Order Act, which provided that in determining the sentence for an offender who had pleaded guilty, the court should take into account the stage in proceedings at which the defendant pleaded guilty, the circumstances in which the intention to plead was given and that, if taking account of the above, the court imposed a

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<sup>12</sup> *Boyd (William Henry)* (1980) 2 Cr. App. R. (S.) 234, *per* Cumming-Bruce LJ at 234.

<sup>13</sup> *Cain* [1976] Crim LR 464 CA. See also *Boyd (William Henry)* (1980) 2 Cr App Rep (S) 234; *Hollington and Emmens* (1985) 7 Cr App Rep (S) 364

<sup>14</sup> [1976] Crim LR 464

<sup>15</sup> n. 13 *supra*

lesser sentence than it would otherwise have done, the judge should state in open court that this was the case. That provision then became s.152 of the consolidating Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A), and is now s.144 of the 2003 Criminal Justice Act (CJA), which does not include the requirement that the judge should state reasons for the lesser sentence in open court.<sup>16</sup> Section 144(2) of the CJA 2003 also contains the provision that a discount (of no more than 20%) can still be given for a guilty plea to one of the offences specified in s.110 and s.111 of the PCC(S)A – despite the fact that these are intended to be mandatory minimum sentences.<sup>17</sup> It seems that the government is willing to sacrifice an element of its ‘tough on crime’ agenda in exchange for maximising the number of guilty pleas.

Increasing the number of guilty pleas alone does nothing to remedy the problem of the cracked trial though, particularly as an essentially unregulated and discretionary discounting process ensured that sizeable discounts were still to be had in many cases even if the guilty plea was entered at a very late stage. In theory, the earlier the guilty plea was entered, the greater the discount which would be applied, but research found that in practice there was no demonstrable advantage to pleading guilty early in order to secure a greater discount (Baldwin and McConville 1978; Moxon 1988). The government has therefore sought to increase the degree to which the sentence discount encourages *early* guilty pleas by the Sentencing Guidelines Council’s introduction in 2004 of the graduated sentence discount, now the updated Reduction in Sentence for Guilty Plea Revised Guideline which was published in July 2007. The Guideline states that the level of reduction should operate on a sliding scale from one third where the plea is entered at the ‘first reasonable opportunity’, to one quarter where the trial date has been set, and to a recommended one tenth for a guilty plea entered ‘at the door of the court’ or after the trial has begun (SGC 2007, para. 4.2). It remains to be seen whether judges will adhere to these recommendations or whether they will use their discretion and award larger discounts, even for late guilty pleas. It was held in *Last*,<sup>18</sup> decided after the publication of the 2004 Guideline, that the Guideline was intended to assist judges but that it could be departed from if valid reasons for doing so were given, and it seems unlikely that the ostensible standardisation of the sentence

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<sup>16</sup> The principle of the sentence discount had, until 1993, been a firm fixture in the Crown Court but was of little significance in the magistrates’ Court. However, the Magistrates’ Sentencing Guidelines published that year formalized the principle that a ‘timely’ guilty plea may be a mitigating factor for which a discount of approximately 1/3 may be given.

<sup>17</sup> s.110 specifies a minimum of 7 years imprisonment for a 3<sup>rd</sup> Class A drug trafficking offence; s.111 a minimum of three years for a third domestic burglary.

<sup>18</sup> [2005] EWCA Crim 106

discount principle will have ensured the complete uniformity of its application.

Perhaps the most striking feature of SGC's 2007 Guideline is that it explicitly states that 'the reduction principle derives from the need for the efficient administration of justice and not as an aspect of mitigation' (para. 2.2). Previously, in cases such as *Cain* and *Boyd*, the courts had emphasised that a significant justification for the sentence discount was that a guilty plea showed an element of remorse, which was deserving of recognition.<sup>19</sup> This emphasis on remorse no longer holds true: irrespective of whether it achieves its aims, the sentence discount now exists purely to encourage early guilty pleas, reduce cracked trials, and save money. The administrative function of the discount is highlighted further by paragraph 2.1 of the Guideline which states that 'the final sentence after the reduction for the guilty plea will be less than the seriousness of the offence requires'; clear evidence that the goal of encouraging early guilty pleas outweighs the principle of just deserts. The Guideline states that full credit (that is, up to one third) will be given if the plea is entered at the 'first reasonable opportunity', which the explanatory Annex suggests may be very early, possibly even at the police station (SGC 2007, Annex 1, p.10). Any encouragement (or pressure) to plead guilty which is created by the sentence discount has therefore been moved to an early stage of the criminal process (and one at which little may be known about the strength of either the defence or the prosecution case), if the defendant is to benefit from a 'full' discount. In *A and B*, the Court of Appeal stated that a defendant can receive an 'extra' discount by cooperating with the authorities by, for example, testifying against co-accused or providing information which leads to the suppression of other serious crime. The greatest discounts are available to those who put the safety of themselves or their families at risk by cooperating with the authorities.<sup>20</sup>

Much of the available literature points to the sentence discount as being either *prima facie* evidence of the practice of plea bargaining (see for example Partington 2008, pp.126 – 127). Duff et al. describe the sentence discount as 'the core of what we have called plea-bargaining strictly speaking' (2007, p. 174). Others at least as a feature which encourages guilty pleas and is conducive to plea bargaining (Darbyshire 2000; Ashworth and Redmayne 2005, Ashworth and Blake 2006; Sanders and Young 2007). Sanders and Young describe it as '[t]he most naked attempt to persuade defendants to plead guilty' (2007, p. 385). Moreover, the sentence discount is undoubtedly a nexus which links cracked trials to plea

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<sup>19</sup> *Cain* [1976] Crim LR 464 CA; *Boyd (William Henry)* (1980) 2 Cr App Rep (S) 234.

<sup>20</sup> [1998] Crim LR 757

bargaining; it encourages guilty pleas, which will often result in a cracked trial (it remains to be seen whether the graduated sentence discount will in fact reduce cracked trials), and, dependent on one's definition of a plea bargain, its operation can also be seen as a form of plea bargaining in its own right, which is the approach taken by this thesis (definitions of plea bargaining are discussed at 1.5 below).

#### **1.4 The relationship between cracked trials and plea bargaining**

The nature of the relationship between cracked trials and plea bargaining has not been expressly considered by previous research. None of the government publications on cracked trials make any reference to plea bargaining as a possible cause of cracked trials, which may be indicative of the fact that the relationship is a sensitive political issue. The government has been reluctant to openly acknowledge the use of plea bargaining, which is in stark contrast to the academic literature which argues for the most part that the use of plea bargaining in England and Wales is very much a reality, and has been for some time (see for example Bottoms and McClean 1976; Baldwin and McConville 1977; McConville et al. 1994; McConville 1998; Darbyshire, 2000; Ashworth 2006; Sanders and Young 2007). There have, however, been some recent developments which suggest that the government may be moving towards implementing a more formal role for plea bargaining in limited circumstances. The Serious Organised Crime and Police Act 2005, ss.71 – 73 allows the prosecution to enter into written agreements with suspects or defendants who assist law enforcement by providing evidence, or by some other means, and the court is entitled to give credit for that agreement. In addition, Lady Scotland, the Attorney-General, announced proposals in March 2008, which have now come into effect, for plea 'negotiations' in serious fraud cases whereby the prosecution and defence can negotiate the agreed level of the defendant's culpability, and sentencing options. The judge is not bound to accept the outcome of the negotiations and can insist on a trial. Lady Scotland has attempted to distance the procedure from plea 'bargaining' and stated that '[T]his is absolutely not plea bargaining, it is plea negotiation' (*The Times*, 4<sup>th</sup> April 2008), and the consultation document circulated prior to the procedure coming into use makes reference to the negative connotations of the term plea 'bargaining' (Attorney General's Office 2008), and it has accordingly been referred to as plea 'negotiation' since. Whilst this is not *quite* an acknowledgement of plea bargaining, it comes close. These recent measures have, however, not made the link between cracked trials and plea bargaining, save that the fraud consultation document expressed the hope that a system of plea negotiation could lead to earlier guilty pleas; there is no mention of the existing relationship between late guilty pleas



and plea bargaining.

This thesis takes the standpoint that there is a clear relationship between plea bargaining and cracked trials.<sup>21</sup> Cracked trials are the ideal forum for plea bargains. In the UK, plea bargains are likely to be struck at the last minute; there is still little incentive to plead guilty or to strike bargains at a particularly early stage. Although earlier guilty pleas should attract greater sentence discounts (at least in theory) this may not be an immediate incentive if the defendant believes there is a chance of acquittal, or perceives that greater discounts are to be had later on in the process. It would be counterintuitive to negotiate any kind of agreement without first knowing the strength of one's own position, and that of the other party, and in many criminal cases this knowledge will not be available until the day of the trial, as a great deal may hinge on whether prosecution and defence witnesses attend, and this can not be known prior to the trial date. Moreover, the literature points to the significance of the barrister's role in advising on plea (Bottoms and McClean 1976; Baldwin and McConville 1977; McConville et al. 1994; McConville 1998; Ashworth and Blake 1998; Tague 2006, 2007).<sup>22</sup> With this in mind, Zander and Henderson's finding that defendants did not meet their barrister until the day of the trial in 70% of cases in which the defendant subsequently pleaded guilty on the day of the trial, becomes all the more significant (1993, p. 1732). If the barrister does play a pivotal role in facilitating plea bargains, and defending counsel meets the defendant at court for the first time, which is also the time at which the prosecutor will be present, it is inevitable that if a plea bargain is struck, it will result in a cracked trial. This relationship has been under researched, but Baldwin and McConville's *Negotiated Justice* (1977) set a precedent for using cracked trials as a means of investigating plea bargaining, insofar as it was the high rate of cracked trials observed during the course of another study which led the authors to investigate the causes, and to conclude that a primary cause was plea bargaining.

The nexus between plea bargaining and cracked trials is relatively straightforward conceptually, but can be problematic methodologically. A bargained for plea is difficult to

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<sup>21</sup> It is interesting to note that in an article about cracked trials, which does not discuss plea bargaining, Bredar describes the process of a trial cracking much as one might describe the process of plea negotiation between barristers: 'what generally happens is that prosecuting and defending counsel compare views on the strengths and weaknesses of their respective cases, and, in an indirect way, discuss what it would take from each side to get the case to 'crack'. Counsel come to a unified view of what would be an appropriate settlement of the matter.' (1992, p.155).

<sup>22</sup> Tague (2006, 2007) draws significantly differing conclusions to those of the other studies, and argues that it is not in barristers' interests to encourage guilty pleas. See Chapter 3.

define, which is compounded by the fact that it is not yet a fully acknowledged feature of the English criminal justice system. This results in an absence of applicable administrative statistics, other than guilty plea and cracked trial rates, which in isolation can not paint a picture of the nature or extent of plea bargaining. Not every cracked trial is a plea bargain; not least because trials are also deemed to be cracked when the prosecution offer no evidence, or the defendant is bound over, or is unfit or deceased. However, most academics have put forward, or at least support, a definition of plea bargaining which incorporates implicit bargaining, which would include a guilty plea with some expectation of a lighter sentence. This would mean that every guilty plea entered in England and Wales with an awareness that the sentence discount exists, would be a plea bargain. As recorded statistics for 2006 show that guilty pleas to the original or an alternative charge account for around 80% of cracked trials, it would follow that 80% of cracked trials were the result of plea bargaining.<sup>23</sup> It should be borne in mind though that this may be a simplistic view to take when little is known about defendants' motivations, the effect of the sentence discount on their decisions, and what proportion of defendants would have pleaded guilty in any case.<sup>24</sup> It is therefore necessary to clarify what is meant by the term plea bargaining, and to review the literature which considers the issue.

## 1.5 Defining Plea Bargaining

Much of the law, literature and research refers to 'plea bargaining' without placing the phenomenon within any definitive boundaries. Of the limited case law, only *Turner* and *Goodyear* consider the concept of plea bargaining in any depth and even these cases provide little assistance in conceptualising plea bargaining in England and Wales.<sup>25</sup> The judgment in the leading case of *Turner* mentions what is referred to as the 'vexed question of so-called 'plea-bargaining'', but no attempt is made to explain what is meant by the term and the judgment in *Turner* confines itself to the type of advice which counsel may give clients and

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<sup>23</sup> The Judicial and Court Statistics 2006 (at p.103) record 64% of cracked trials in 2006 as being due to the defendant pleading guilty on the trial date, and 18% being due to the prosecution accepting a plea of guilty to an alternative charge.

<sup>24</sup> The Criminal Justice: Working Together Report by the Comptroller and Auditor General. (London: The Stationery Office, 1999) made the recommendation that to reduce cracks, the Home Office and the then Lord Chancellor's Department should collect information on the use of sentence discounts and evaluate their impact on defendant behaviour, and review whether the system could be improved. To date, this recommendation has not been acted upon.

<sup>25</sup> *Turner* [1970] 2 Q.B. 321; *Goodyear* [2005] EWCA Crim 888

the propriety of judicial indications of sentence, without addressing any wider issues.<sup>26</sup> More recently, in *Goodyear*, whilst delineating the extent to which the judiciary may give advance indications of sentence, the Court of Appeal restricts itself to stating that the judge 'is not to be asked to indicate levels of sentence which he may have in mind depending on possible different pleas'.<sup>27</sup> The court effectively limited itself by refraining from going beyond this narrow concept of what plea bargaining might be and bypassed an opportunity to consider the legality and wider role of plea bargaining.

Some of the empirical research is more instructive in defining and distinguishing between different forms of negotiated plea but previous studies in England and Wales have taken varied approaches to defining plea bargaining. Baldwin and McConville introduce their study by making reference to the fact that there was at that time no knowledge of the precise forms that plea bargaining could take (1977, vii). The authors' analysis of their empirical findings led them to discern four categories of late guilty plea: i) no deal or pressure: defendant guilty as pleaded; ii) plea bargain: offer made and accepted and benefit accrues to the defendant; iii) no explicit bargain but the defendant thinks or assumes that a bargain has been struck on his behalf; and iv) pressure from barrister but no specific offer made to the defendant. Types ii) and iii) were therefore the two categories of guilty plea which could most readily be described as plea 'bargaining'. Bottoms and McClean felt that 'the essence of plea bargaining is that the defendant agrees to plead guilty to at least one charge in return for some concession by the prosecution' (1976, p.123), and McCabe and Purves (1972) identified two varieties of plea bargain: (i) involving a judicial indication as to sentence and (ii) situations where counsel's advice, discussions and negotiations led to a defendant pleading guilty. It is interesting to note though that Bottoms and McClean regarded the latter as 'plea changing' rather than 'plea bargaining' (1976, p.128).

The term 'plea bargaining' has become the accepted term in the academic literature to denote a range of types of negotiated settlement in criminal cases and as demonstrated above, empirical studies have differed in their identified categories of plea bargain.<sup>28</sup> A degree of consensus is nonetheless present in the literature (see in particular: Darbyshire

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<sup>26</sup> *Turner* [1970] 2 Q.B. 321 at 326

<sup>27</sup> *Goodyear* [2005] EWCA Crim 888 at 67

<sup>28</sup> There is a considerable body of literature on plea bargaining in the USA which explores what 'plea bargains' are, on normative, prescriptive, and theoretical levels. See for example Miller, McDonald and Cramer (1978), McDonald (1979), Nardulli, Fleming and Eisenstein (1985), Scott and Stuntz (1992a) and Schulhofer (1992). Newman (1956) provides one of the first categorisations of different types of plea bargain in the USA.

2000; McConville 2002; Ashworth and Redmayne 2005; Sanders and Young 2007; Cownie et al. 2007; Partington 2008) and the primary distinctions are between charge, fact, 'straightforward' plea bargaining, and sentence bargaining, though there is a great deal of overlap, in particular between the latter two types. These distinctions are outlined below.

#### 1.5.1 Differentiating between charge, fact, 'straightforward', and sentence bargaining

Charge bargaining occurs when a defendant pleads guilty in exchange for a prosecutorial agreement to reduce the severity and/or number of charges and the CPS has a wide discretion to drop or reduce charges. The Code for Crown Prosecutors states that prosecutors should select charges which: reflect the seriousness and extent of the offending; give the court adequate powers to sentence and impose appropriate post-conviction orders; and enable the case to be presented in a clear and simple way, and that this means that 'Crown Prosecutors may not always choose or continue with the most serious charge where there is a choice' (CPS, 2004, at para. 7.1.). The Code does, however, also state that 'Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one' (para. 7.2). There is a limited degree of judicial oversight of the practice, and in *Soanes*, Lord Goddard stated that 'it must always be at the discretion of the judge whether he will allow [a plea of guilty to a lesser offence] to be accepted'.<sup>29</sup> In those situations where the accused pleads guilty to some counts on the indictment in exchange for the prosecution offering no evidence on others, the rule appears to be that the prosecution is bound by the judge's views of the bargain only if counsel has expressly asked him to approve it in advance. The Court of Appeal held in *Grafton* that a trial judge was powerless to prevent counsel dropping or reducing charges except where counsel has sought judicial approval for the proposed deal, meaning that the barristers would essentially have a free reign to negotiate between themselves with little check on the nature or outcome of their negotiations, other than that the defendant need at least appear to make a voluntary and informed plea.<sup>30</sup> In *Herbert*, the Court of Appeal went further and held that the practice of the Crown indicating that they would be willing to accept pleas of guilty to lesser offences was not only acceptable, but had long been part of the prosecutor's public duty.<sup>31</sup> This indicates that the swift disposal of cases is seen as being in the public interest,

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<sup>29</sup> (1948) 32 Cr App R 136

<sup>30</sup> [1993] Q.B. 101

<sup>31</sup> (1991) 94 Cr App Rep 2

and charge bargains (whether or not the CPS chooses to call them such), are a firmly established feature of the criminal courts.

Fact bargains have been described by Ashworth and Redmayne as lying half-way between charge bargains and what they refer to as 'straightforward' plea bargaining (2005, p. 274). A fact bargain occurs when, in exchange for a plea of guilty, the prosecution agrees to present a certain version of the facts, for example to not mention a particular aggravating factor, or to accept that the offence was committed recklessly rather than with intent, (which would have a bearing on sentencing) and prosecutors have a wide discretion to present the facts in the manner they feel is appropriate. A basis of plea, where a defendant makes a written statement which is agreed by all parties to be a representation of the factual basis of the plea (and resulting sentence) equates to a fact bargain. What Ashworth and Redmayne refer to as 'straightforward' plea bargains are situations where there is no bargain related to the charge or the facts, but the defendant simply pleads guilty in the expectation of a lower sentence, as is provided for by the principle of the sentence discount (2005, p.275). (See also Darbyshire 2000; McConville 2002; Sanders and Young 2007, pp.385-401; Partington 2008, pp.385-401).

Particularly in the North American context, much of the literature refers to the additional category of the sentence bargain, whereby a plea of guilty is exchanged for the promise of a lower sentence, and often a specified maximum sentence. In England and Wales, prosecutors have no power to recommend specific sentences and the discretion lies in the hands of the judge. Sentence bargaining in England is therefore much the same as straightforward plea bargaining, in that a guilty plea is entered in the hope of a lower sentence; an expectation which is generally matched. It could be argued, however, that the introduction of maximum sentence indications by the judgment in *Goodyear*<sup>32</sup> makes the concept of sentence bargaining as distinct from 'straightforward' plea bargaining a reality in England and Wales. It could also be argued that the introduction of a limited number of mandatory minimum sentences in England and Wales has also contributed to the likelihood of a type of sentence bargaining. Section 110 of the PCC(S)A 2000 provides for a minimum custodial sentence of seven years for a third class A drug trafficking offence, and s.111 a minimum custodial sentence of three years for third domestic burglary. Section 287 of the Criminal Justice Act 2003 amended the Firearms Act 1968 and inserted s.51A, which introduced a mandatory minimum sentence of five years imprisonment for the

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<sup>32</sup> *R v Goodyear* [2005] EWCA Crim 888.

possession, purchase, acquisition, manufacture, transfer or sale of prohibited weapons. However, the judge has discretion not to impose the minimum custodial sentences if he is of the opinion that there are circumstances which relate to the offences or to the offender which would make it unjust to do so, and if so, the particular circumstances must be stated in open court. Mandatory minimum sentences have proved unpopular and have been rarely used by judges, who in the majority of cases have found reason to state that their imposition would be unjust in the circumstances (see eg. Jones and Newburn 2006). Nonetheless, their existence does make the prospect of sentence bargaining of a more American nature, where the prosecution may offer to accept a guilty plea to a reduced charge so that the defendant can avoid falling foul of a mandatory sentence, a possibility in the UK.

Despite it being possible to establish a level of clarity as to several different *types* of plea bargain, there is no accepted catch-all definition of a plea bargain, although the US literature has turned to this matter frequently and in considerable depth over the past decades. Newman's distinction between implicit and explicit bargaining (1966) marked a key stage in the development of theory in this area, and his inclusion of implicit bargaining provided the framework within which a range of negotiations and types of behaviour could be conceived of as plea bargaining. This was developed by Goldstein and Marcus' research which documented that even in jurisdictions where explicit plea bargaining was not prevalent (such as England), and defendants were not able to negotiate directly, they learned about a regular pattern of expectations and that they could expect greater leniency if they did not challenge the prosecution case (1977, p. 278). Friedman also found 'ample evidence of 'implicit plea bargaining' in his study of historical plea bargaining in California (1978, p.247). Miller, McDonald and Cramer put forward the broad definition of a plea bargain as 'a defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state' (1978, p.2). More recently, Vogel (2007) has published research which incorporates what she terms 'tacit' bargaining and argues that guilty pleas are induced by an *expectation* of leniency, but that it is not necessary for leniency to actually be awarded in every case in order for the practice to operate. As discussed above, given the existence of the sentence discount, this would mean that every guilty plea entered in the knowledge that a discounted sentence would result, was a plea bargain. Without interviewing defendants about the impact the sentence discount had on their decision to plead guilty, it is, however, impossible to know whether *every* guilty plea is effectively a bargain with the state, induced by the expectation of leniency.

This raises the issue of whether plea bargaining is to be defined on a systemic or on an individual, case by case level. This thesis submits that on a systemic level, every guilty plea (even where there is no explicit bargaining of facts or charges, or pressure from a legal advisor) is a plea bargain. The inducements to plead guilty provided for by the criminal justice system (the sentence discount in particular) ensure that guilty pleas are generally rewarded, and even if they are not rewarded in each individual case, defendants enter guilty pleas in the expectation that they will receive a more lenient sentence, and are thus entering into an agreement with the state; an agreement which bears all the hallmarks of a plea bargain.<sup>33</sup> The definition of plea bargaining adopted by this study (which draws on the broad definitions put forward by Miller, McDonald and Cramer (1978) and Vogel (2007), amongst others, in its incorporation of implicit bargaining) is that:

Any guilty plea which a defendant believes will give rise to benefits or concessions which flow from the prosecuting authorities or the government to the defendant, directly or indirectly, is the result of a plea bargain.

The practice is therefore operational in England and Wales, firstly as a result of the sentence discount, which ensures that in all but the very rarest cases, a defendant can expect his guilty plea to attract the benefit of a lesser sentence. The additional benefits or concessions available to defendants in some cases (such as *Goodyear* indications, or charge reductions) operate on top of the ‘base layer’ of the sentence discount. It is possible that the guilty plea may not attract leniency in each individual case, but the practice can still be said to be operating on an institutional level (Vogel 2007, p.92). Research has shown that sentencers may not always take sufficient account of a guilty plea (Moxon 1988), and that charge ‘reductions’ may merely be the consequence of the offence having initially been overcharged (McConville, Sanders and Leng 1991), but if the defendant *perceives* that he stands to benefit from entering a guilty plea, then a plea bargain has nonetheless elicited his plea.

However, one aim of this study was to consider the dynamics of cracked trials and plea bargaining in individual cases, rather than on a purely institutional or systemic level. On an individual level, additional issues emerge, as individual defendants’ motivations will have an

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<sup>33</sup> Research has shown that the vast majority of defendants are made aware of the sentence discount; the National Audit Office found that 95% of defendants in Crown court cases were aware of the discount (National Audit Office 2000).

effect on their entry of a guilty plea, and those motivations may not always tally with a conceptualisation of plea bargaining which is premised upon an institutional definition. Friedman, whilst accepting that plea bargaining could account for a large proportion of guilty pleas also wrote that defendants might plead guilty because of ‘remorse, self-hate, or sheer hopelessness; or to get things over without spending money; or to avoid the shame and humiliation of the process’ (1978, p. 255). As defendants were not interviewed or surveyed for this study, it was not possible to discern whether such factors played a role in their decisions to plead guilty, alongside any plea bargaining in operation. Nonetheless, under the definition of plea bargaining put forward by this thesis, even if such factors played a role in inducing some individual guilty pleas, the practice of plea bargaining would still be operational as the benefits of the guilty plea (which would at the very least be the sentence discount) would still flow to the defendant.

As plea bargaining is central to this study’s exploration of cracked trials, its origins, the traditional justifications for and criticisms of its use and the existing empirical research on plea bargaining in England and Wales require further examination and are discussed in the following sections of this chapter.

## **1.6 The origins of plea bargaining**

McConville refers to plea bargaining as ‘the most virulent virus ever to have invaded the criminal justice system’s body’ (2002, p.376), and in order to understand how plea bargaining may have become endemic, it is necessary to consider its origins and growth. Despite the prevalence of the guilty plea as a means of case disposition (and thus the potential for plea bargaining) in both the USA and England and Wales, this has only been the case for the past century or so and is generally said to be unique to adversarial systems such as the Anglo-American model of justice.<sup>34</sup>

The literature on the origins of plea bargaining can (with some exceptions) be grouped into three categories. Firstly, there is a body of early work on plea bargaining which attributes its rise to increasing case load pressures (Miller 1927; Moley 1928). Secondly, there is the school of thought that the increasing complexity of the trial, its ‘lawyerisation’, and court

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<sup>34</sup> Plea bargaining is rare in inquisitorial jurisdictions, which often have no concept of plea. The introduction of a limited form of plea bargaining in France in 2004 proved controversial but the public prosecutor can propose a penalty to suspects of minor crimes a penalty not exceeding 1 year in prison in exchange for a guilty plea. See also Goldstein and Marcus (1977); Leigh and Zedner (1992); Ma (2002); Langer (2004).



room actors' working practices led to a dramatic rise of plea bargaining from the late 19<sup>th</sup> century onwards (Heuman 1974; Feeley 1973, 1982; Langbein 1978; Fisher 2000, 2003). Thirdly, there are those who argue that plea bargaining should be seen in an even wider context and that external social and political factors account for its rise (McConville and Mirsky 2005; Vogel 2007). There is a parallel to be drawn between these three waves of explanation, and three distinct phases of research on plea bargaining; it's 'discovery' in the 1920's, a huge expansion of work in the 1970's, and its more recent examination over the past decade, although only the latter two waves of research apply to England and Wales, and have been on a significantly smaller scale.<sup>35</sup>

The first phase of research emphasised the importance of rising case loads as an explanation for the plea bargaining it discovered. Plea bargaining did, and still does, 'offer an expeditious and cost effective way of dealing with the large backlog of cases that seem to be a feature of most modern systems' (McConville 2002, p.353). The widespread discovery of plea bargaining in the USA came about as a result of the surveys which many American criminal jurisdictions carried out in the 1920s (Fosdick 1922; Fuller 1931; Illinois Association for Criminal Justice 1929; Missouri Association for Criminal Justice 1933) and the high rates of guilty pleas, and the associated plea bargaining they discovered came as a surprise both to scholars and to the general public (Miller 1927; Moley 1928). A range of factors were identified which accounted for the increase in caseload, such as new laws governing the licensing of alcohol, the rise in motor vehicle use which led the emergence of a body of law to deal with traffic violations, urban expansion which necessitated laws on building and sanitation, and the inadequacy of criminal justice officials, from police to judges, to deal with this rise (Miller 1927).

This line of argument stood relatively unchallenged (although the reliance on it was cast into doubt by Feeley, 1973) until Milton Heuman's 1974 article, 'A Note on Plea Bargaining and Case Pressure', in which he challenged the assumption that 'case pressure and plea bargaining appear to 'go together'' (p. 517) and today, few commentators would regard case pressure as the only factor behind plea bargaining's rise. As Heuman demonstrated in his analysis of court dispositions in Connecticut, there appeared to be no causal relationship between the guilty plea rates at 'high volume' courts, which faced the greatest case pressure, and 'low volume' courts, even when factors such as staffing levels were taken into account. Heuman's article was written during what could be described as

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<sup>35</sup> Fisher (2003, p.6) refers to 'waves' of research.

the heyday of plea bargaining research in the USA. There was some notable research between the 1920's and 1970's (particularly Newman 1956, 1966) but the late 1970's and early 1980's marked a reinvigoration of interest in plea bargaining. American research at the time examined a wide range of issues in depth, such as at the role of defending and prosecuting lawyers, the likelihood of plea bargaining in particular cases, alternatives to plea bargaining and theoretical approaches to the negotiated plea (for example: Alschuler 1975, 1983; Reiss 1975; Rhodes 1976; Miller, McDonald and Cramer 1978; McDonald 1979; Jacob 1984; Schulhofer 1984). 1978 notably saw the publication of a *Law and Society* special edition on plea bargaining with contributions from Feeley, Langbein, Alschuler and Heumann amongst others. It was around this time that plea bargaining also attracted a degree of academic attention in the UK (McCabe and Purves 1972; Bottoms and McClean 1976; Baldwin and McConville 1977, 1978; Seifman 1980).

As well as exploring the practice of plea bargaining as it was operating in the courts at that time, the literature began to explore other reasons for its origins. The link between plea bargaining and the rise in importance of the lawyer, and the associated complexity of trials, emerged as a key school of thought (Feeley 1997; Langbein 1979).<sup>36</sup> It has been argued that the guilty plea (and thus the potential for plea bargaining) can be linked to the growth in importance of the lawyer as a courtroom actor over the past 250 years. During much of the 18<sup>th</sup> century, there was a general rule forbidding defendants the right to counsel and prosecution lawyers acting on behalf of the victim were permitted, but uncommon.<sup>37</sup>

However, research on the Old Bailey Session Papers of the period suggests that at some point during the 1730's, defence counsel began to be allowed to examine and cross examine witnesses and appeared to take a more frequent and larger role in the courtroom, despite there being no express relaxation of the rule prohibiting their presence (Langbein 1978; Feeley 1997). Until 1836, when the rule was formally abolished, defence lawyers were

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<sup>36</sup> Feeley and Langbein both examine the historical rise of plea bargaining in England, rather than in the USA.

<sup>37</sup> See Langbein (1978) for further discussion of the rationale behind the rule forbidding defendants the right to legal representation. Langbein (1979) does also, however, refer (at n.11) to evidence which suggests there may have been a spate of plea bargaining in late Elizabethan England. Vogel also points to isolated evidence of infrequent plea bargaining in earlier British history (2007, p.94) and in research on property crimes in Essex between 1740 and 1820, King has argued that informal settlements were a relatively frequent option (2000, p.92).

still not permitted to address the jury.<sup>38</sup>

At some point during the mid 19<sup>th</sup> Century, guilty pleas began to occur with increasing frequency and Feeley documents that plea switching from not guilty to guilty on a reduced charge became commonplace towards the latter part of the 19<sup>th</sup> century; evidence which strongly suggests the use of charge bargaining (Feeley, 1997). There are some references to plea bargaining being in existence in this early era and Friedman refers to a letter dated 1862 from the Home Office to a magistrate in Southwark complaining about the practice, writing that '[p]ermission to plead guilty followed by a trifling sentence' was no deterrent (1978, p.248).<sup>39</sup> Feeley argues that plea bargaining was 'a response to an increased capacity for adversariness' (1997, p.188) which arose as a result of lawyers taking an increasingly active role, and the trial process becoming more complex, with rules of evidence taking greater priority.<sup>40</sup> Similarly, Langbein writes that the rise in evidential provisions resulted in the jury trial no longer being an efficient means of case disposition, as it had been previously when it was effectively a form of summary justice (1979, p.262). An alternative interpretation of this would be that the advent of the lawyer's primacy in the courtroom led to a decline in adversarial principles which arose when victim and accused faced each other more directly across the courtroom and perhaps mediated, negotiated forms of justice arose to replace those principles and to suit the needs of lawyers and growing case lists. It is worth noting that these processes occurred relatively late in England and Wales, when compared with the USA or even Scotland, where prosecutions were institutionalised and taken out of the hands of private individuals on a much wider scale at an earlier stage (Reiss 1975, p.4).

Some of the most recent research argues, however, that the rise of plea bargaining must be seen in an even wider context. The argument put forward by McConville and Mirsky in a study based on an empirical analysis of New York trials between 1805 and 1865, is that accounts of plea bargaining which focus on the lawyerisation or professionalization of the process fail to take into account a wider range of features such as judicial politicisation and changing perceptions of crime, and that the criminal justice system was in fact complex and professionalised well before the advent of routine plea negotiations (McConville and Mirsky 2005). Similarly, although with a different focus, Mary Vogel's account of the rise of

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<sup>38</sup> The rule was abolished by *The Second Report From His Majesty's Commissioners On Criminal Law* 6 (London 1836).

<sup>39</sup> Citing Home Office Papers, No. 60, Vol 7, p.57: correspondence from H. Waddington, Whitehall to T.B Burcham, Esq. Southwark, Sept 16, 1862.

<sup>40</sup> These arguments are also put forward by King (2000), pp.223 – 228.

plea bargaining in Boston brings changing social and political institutions to the fore and argues that a system of social control effectively became reworked into the practice of plea bargaining and Vogel writes that ‘plea bargaining emerged in Boston during the 1830s and 1840s as part of a political struggle to stabilize and legitimate newly established elites and democratic institutions’. She argues that in doing so, it enhanced the discretionary powers of both prosecuting and defending lawyers, who often had aspirations to political careers (Vogel 2007, pp. 325 - 326). Fisher claims that such accounts minimise the role of human actors (2000, p. 859) and argues that ‘we are unlikely to find the root causes of so court-focused a practice anywhere outside the courtroom’ (2003, p. 11). It is evident that there is still no consensus on the origins of plea bargaining. Whether or not any of the existing approaches can provide a full explanation which rings true across jurisdictions and eras, it seems clear that, for whatever reason, the increased reliance on the guilty plea developed in tandem with the modern trial.

## **1.7 Traditional justifications for, and criticisms of, plea bargaining**

The arguments commonly used to justify, and to oppose, plea bargaining can be distilled into three areas: (i) cost and efficiency, (ii) due process and adversarialism and (iii) victims and other witnesses.

### **1.7.1 Cost and efficiency**

The overriding justification for plea bargaining is that in encouraging guilty pleas, the process saves time and money and becomes more efficient. On average, a guilty plea in the Crown Court takes 1.3 hours, compared with 9.8 hours for a contested trial (Judicial and court statistics 2006). Considered in this light, the only problem with plea bargaining is that it happens too late and results in cracked trials which, whilst quicker and cheaper than trials, require greater resources than an early guilty plea. Efficiency has become a key performance indicator for criminal justice agencies, to the extent that the 1993 Royal Commission on Criminal Justice had, as its general terms of reference the ‘...effectiveness of the criminal justice system...in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, *having regard to the efficient use of resources*’ [emphasis added] (RCCJ, 1993, p. iii). It is a frequently held assumption (albeit one increasingly not borne out by evidence) across Anglo-American legal systems that the courts would simply become overburdened were it not for a high rate of guilty pleas (regarding England and Wales, see for example McCabe and Purves 1972; Bottoms and

McClean 1976; Seifman 1980; RCCJ, 1993). However, Darbyshire has argued that the courts are not overburdened, and if the sentence discount were abolished, courts would cope with any additional caseload and 'the sky will not fall in' (Darbyshire 2000, p.908).<sup>41</sup> Schulhofer's seminal article, '*Is plea bargaining inevitable?*', argued that a system could be instituted in the USA which made no use of plea bargaining whatsoever, with only a minimal increase in resources (a 9% increase to reduce a 90% plea rate to a 70% plea rate) (Schulhofer 1984, p.1085).<sup>42</sup>

There have been two notable experiments in banning the use of plea bargaining, which had very different results in terms of the impact on court efficiency. El Paso, Texas banned implicit and explicit plea bargaining in 1975, and adopted a system that provided no particular incentive to plead guilty. After two years, an unmanageable backlog of cases has formed and the courts began to reintroduce plea bargaining. Although this appears to indicate that a system which has once been reliant on inducements to plead guilty cannot function if those inducements are removed, it has been argued that the main factor in the experiment's failure was that the defence Bar was resistant to the new scheme (Daudistel 1980). In stark contrast with El Paso's experience, Alaska's ban on plea bargaining was very successful, and the ban (albeit with some modifications) is still in place: court processes actually speeded up and the guilty plea rate remained high despite the lack of incentives for defendants to plead guilty.<sup>43</sup> The total number of trials (even with the increase following the ban on plea bargaining) remained very small though, given the small size of the Alaskan jurisdiction (Rubenstein and White 1978a, 1978b, 1978c). Closer to home, the Scottish legal system functioned despite being traditionally hostile to plea bargaining and there was no general principle of a sentence discount to encourage or reward guilty pleas. Since the recent decision in *Du Plooy v HM Advocate*<sup>44</sup> this is however no longer the case and it was held that an early guilty plea can be rewarded with a sentence discount of up to one third (see Leverick 2004; Shiels 2007).

There is therefore ample evidence that whilst plea bargaining can save time and money, it is

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<sup>41</sup> Although it is unclear which statistics or other evidence Darbyshire relies upon to support her argument.

<sup>42</sup> Schulhofer's results were based on an analysis of trials in Philadelphia in 1982, where very little use was made of bargaining, despite a rising caseload. He found that trials took up 45% more court time than guilty pleas; much less than had been assumed.

<sup>43</sup> See Alaska Judicial Council (1991), 'Alaska's Plea Bargaining Ban Re-evaluated'. There was only a 6% - 9% increase in not guilty pleas. Charge bargaining is, however, said to be common now, despite an official policy maintaining the ban.

<sup>44</sup> (2003) SLT 1237.

not necessarily the most efficient use of resources, and certainly not to the extent that a criminal justice system reliant on it would collapse without it. Stephen and Tata (2006), Stephen, Fazio and Tata (2008) and Stephen and Garoupa (2008) have recently published studies examining plea bargaining in Scotland from an economic perspective and have found it not to be as efficiency enhancing as is often assumed. The myth of the overburdened trial system remains powerful though, and the focus of efficiency based criminal justice policy appears to remain on reducing the overall number of trials.<sup>45</sup>

### 1.7.2 Due process

Reducing the number of trials means reducing the instances of adversarialism and thus the arena in which many of a defendant's strongest due process safeguards take effect and arguably leads to crime control orientated processes (Packer 1968). The fact that plea bargaining results in so many cases being disposed of without a trial undermines the burden of proof resting on the prosecution; cases are not proven beyond reasonable doubt before a jury. The high rate of guilty pleas means there may be little incentive for the prosecution to ensure that only well prepared, strong cases are brought to trial, which means more weak cases are brought and with that, potentially more innocent people are convicted, which from a due process perspective is one of the most fundamental flaws of a system reliant on plea bargaining. The 1993 RCCJ stated that it was 'naïve to suppose that innocent persons never plead guilty because of the prospect of the sentence discount'. This goes against fundamental principles of due process and the right to a fair trial, but the Commission chose instead to place greater emphasis on encouraging the guilty to plead guilty. Whether or not innocent defendants would plead guilty as a result of plea bargains is a contentious debate, but there is well documented and methodologically sound empirical evidence from both the USA and England and Wales which suggests it does occur; evidence which can not simply be overlooked (Blumberg 1967a; Dell 1971; Baldwin and McConville 1977; Zander and Henderson 1993). Zander and Henderson found that in 53 cases defence barristers answered in the affirmative when asked whether they had concerns that the defendant in the case might in fact be innocent. If this were representative, and accurate, it would equate to over 1300 innocent defendants per year pleading guilty (1993, pp.138 – 139). Zander, however, has written that 'so far as one can tell, few are likely to be thought to be a cause for concern', on the basis that upon closer examination, most were cases in which the barrister felt the defendant was maintaining innocence in the face of

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<sup>45</sup> For a critique of the 1993 RCCJ's approach to this issue, see Field and Thomas (1994).

strong evidence, and was reflecting that concern on the questionnaire, rather than his or her own opinion. Others were cases in which the barrister was satisfied that the client was guilty of at least some counts on the indictment (1993b, p.85).<sup>46</sup>

McConville and Bridges (1993) were critical of Zander's reasoning though and several other authors have put forward strong arguments based on the available empirical evidence that innocent defendants in England do on occasion enter guilty pleas following plea bargains (Darbyshire 2000; McConville 2002; Ashworth and Redmayne 2005; Sanders and Young 2007).<sup>47</sup>

In addition to the risk of innocent defendants pleading guilty, sentence discounts for guilty pleas penalise those defendants who elect to go to trial and put the prosecution to proof; Sanders and Young describe this as an 'elementary point' (2007, p.434) but one which is often disputed by those who claim that the discount simply rewards those who plead guilty. It seems an almost impossible point to dispute: if we accept that defendants have the right to a fair trial, then it is unjust that they should receive a longer sentence upon conviction than that would have done had they pleaded guilty. To argue otherwise quite blatantly prioritises crime control considerations of cost and efficiency over basic rights, yet this is what successive governments have done by virtue of their endorsement of the sentence discount and other inducements to plead guilty.

### 1.7.3 Victims and other witnesses

A further issue, and one which seems to be used as often to support plea bargaining as it is to criticise it, is the impact that a guilty plea, particularly a negotiated plea, has on victims and other witnesses. The White Paper *Justice for All*, which preceded the Criminal Justice Act 2003 makes the assumption that early guilty pleas would be favoured by victims (2002, p.77) but there are doubtless many victims who would prefer 'their' defendant to face a full trial, be confronted with the evidence against them, and receive a 'full' sentence, rather than two thirds of a sentence. Fenwick writes that the justification for the use of the sentence discount has often been found in the desirability of sparing witnesses, particularly victim-witnesses, the ordeal of a trial (1997 p.26). However, from the victim's perspective, whilst a

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<sup>46</sup> See also McConville and Bridge's (1993) critical response to Zander's interpretation of the findings.

<sup>47</sup> As Sanders and Young put it, 'Do the innocent plead guilty? (Is the Pope a Catholic?) (2007, p.430).

late guilty plea spares him the need to give evidence and eradicates the fear that the trial will result in an acquittal, it does not alleviate the ordeal of waiting during the most stressful time – immediately before and at court hearings. Therefore, in terms of its validity as a justification for the sentence discount, the victim centred argument is at its most powerful where there is an early guilty plea, and a formal graduated discount system as proposed by the RCCJ to reward early guilty pleas, and currently provided for in the 2007 SGC Guideline, might be in victims' interests. Nonetheless, as Fenwick (1997) argues, a graded discount could create additional pressures on innocent defendants to plead guilty, and victims have an interest in seeing the true offender punished.

Victims of violent or sexual offences in particular may feel let down by a system that is heavily reliant on charge bargains which result in counts of grievous bodily harm being 'downgraded' to actual bodily harm, offences of violence reinterpreted as public order offences, or rape defendants pleading guilty to lesser sexual offences. Even where the offender pleads guilty to the indictment as it stands, victims may be disappointed when they learn that the offender's guilty plea automatically entitles him to a sentence discount. Sanders and Young comment that 'witness distress may be all the greater if the cracked trial is achieved through a last minute charge bargain resulting in a re-labelling of the offence in a way a victim finds objectionable' (2007, p.429) and Hoyle and Zedner point out that victims may feel unwilling to cooperate with the CPS in the future if unexplained decisions to drop cases have caused them distress (2007, p.473). There was public outcry following the case of *Peeverett* in which a headmaster who had indecently assaulted pupils at his school agreed to plead guilty to some charges, with the basis of plea that his intention had been to exert power over the girls, not to derive sexual gratification.<sup>48</sup> He received a suspended sentence, which the Attorney General sought to appeal on the ground of undue leniency, but the Court of Appeal ruled that there was no leave to appeal, as *Peeverett* had relied on assurances made by the prosecution, and these promises could not be reneged on. There was a similar furore when Craig Sweeney, convicted of the sexual assault and abduction of a child was given a life sentence but was to be eligible for release on license after five years (in part as a result of the effect of his guilty plea) and there were calls in the media for the sentence discount to be abolished.<sup>49</sup>

Whether plea bargains work to the advantage or to the detriment of victims will ultimately be dependent on the individual circumstances of cases; neither can be a universal criticism

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<sup>48</sup> *A-G's Ref NO. 44 of 2000 (R v Peeverett)* [2001] Crim LR 60

<sup>49</sup> See for example 'Reid seeks review of paedophile sentence' *The Guardian*, 12<sup>th</sup> June 2006 and 'Paedophile case ignites sentence row' *The Guardian*, 13<sup>th</sup> June 2006.



of, nor justification for, the use of plea bargaining. This in itself means that the government's reliance on the supposed benefit to victims of earlier guilty pleas in order to justify measures which are at the very least conducive to plea bargaining, is built upon shaky foundations.

## **1.8 Empirical research on plea bargaining in England and Wales**

As stated in the introduction to this thesis, there has been relatively little empirical research on plea bargaining in the UK, in contrast with the more developed body of work in the USA, where plea bargaining is widely acknowledged and is to an extent a regulated feature of the criminal justice system and its relative lack of acknowledgement in the UK has stunted the potential for research on plea bargaining in England. Despite a flurry of groundbreaking research during the late 1970's and early 1980's, there has not been a great deal of writing on the subject in the UK, and even less empirical research. There have been little more than a handful of empirical studies in England and Wales which have examined the nature and application of plea bargaining to some degree and the key studies have used a variety of methods and taken different approaches to the problem, making it difficult to draw any overarching conclusions. Nonetheless their importance, particularly given that there is such a limited body of work available, should not be underestimated. Baldwin and McConville's 1977 research is the classic study and the only one to aim for a specific and systematic investigation of the nature of plea bargaining. Other empirical work has been carried out by Dell (1971), McCabe and Purves (1972), Bottoms and McClean (1976), Seifman (1980), Zander and Henderson (1993), McConville et al (1994) and most recently Tague (2006, 2007).

Dell's was a study of Holloway inmates which found that 12% of those tried at the Magistrates' court were 'inconsistent pleaders'; those who pleaded guilty despite protesting innocence (Dell, 1971). One quarter of these had no previous convictions and cited police advice or pressure as their reason for pleading guilty. Approximately 80% of the sample had no legal representation, which makes it difficult to compare with more recent studies and cases where legal representation is available to, and used by, the vast majority of defendants. It is also worth noting the potential significance of Dell's sample being comprised entirely of women, which again makes it difficult to draw comparisons with other studies.

After Dell's research came Bottoms and McClean's 1976 study; a broad examination of

defendants in the criminal process, not specific to plea bargaining. Bottoms and McClean were wary of American research which suggested that large proportion of guilty pleaders protested innocence (Blumberg 1967a), but still found that 18% of their guilty pleaders suffered ‘quite possibly mistaken convictions’ in respect of at least one charge (p.120). The most common reason given for the guilty plea was their own lawyer’s advice. Late plea changers were also examined and 68% said the reason was their barrister’s last minute advice – often contradicting the solicitor’s long-held view that they ought to maintain a not guilty plea. They found that in many cases defendants did not ‘take decisions’ in any formal sense (Bottoms and McClean 1976, p.8) and the study thus provided reinforcement for Baldwin and McConville’s research which was published the following year.

Baldwin and McConville’s seminal work, *Negotiated Justice: Pressures to Plead Guilty* was the first detailed empirical examination of the issues in the UK (1977). It was highly controversial at the time, and met with strong criticism and denials by the legal establishment. Loosely structured interviews on plea and reasons for plea were conducted with 121 defendants within one month of sentence by Birmingham Crown Court. As stated above, the authors distinguished four broad categories:

Fig. 1.5 *Negotiated Justice*: Guilty plea reasons

Reason for guilty plea	Percentage of sample (%)
No deal or pressure – guilty as pleaded	28.9
Plea bargain – offer made and accepted – with supposed benefit to defendant	18.2
No explicit bargain, but defendant thought a deal was struck on his behalf	13.2
Pressure from barrister to plead guilty, but no specific offer	39.7

Pressure from defendants’ own barristers (not accompanied by any apparent offer or bargain) was identified as the most common reason for late guilty pleas. In 18.2% of the cases sampled, however, the authors found that there was an explicit plea bargain in which an offer was made and accepted, and in 13.2% of cases the defendant was of the opinion that a deal had been struck on his behalf.

More recently, in the Crown Court Study commissioned by the Runciman Commission and carried out by Zander and Henderson, plea bargaining was just one of many issues

researched. Of 269 defendants responding to a questionnaire 11% of guilty pleaders claimed they had not committed the offence. The study found that counsel saw his client for the first time on the morning of the hearing in almost 70% of cases in which the defendant changed his plea to guilty on the day (p.1732). This again points to both the primacy of the barrister's role in plea formation, as distinct from the solicitor's, and also to the fact that many barristers (at least in that study's sample) may have arrived at court ill-prepared to deal with a full trial. McConville et al's *Standing Accused*, also published in 1994, provides additional evidence of the significance of the legal profession's role in plea bargaining, and explores the effect legal representatives (although particularly solicitors, rather than barristers) have at various stages of the criminal justice process, and was able to explore the issues on a wider theoretical level than the Crown Court Study. The authors found that clients were regarded as 'good' if they accepted advice compliantly and ideally plead guilty without complaining. 'Bad' clients resisted advice, requested meetings with counsel in advance of trial, and objected to discontinuous representation. Even 'good' clients were often interviewed and seen at the police station by clerks as it is not profitable for fee earning solicitors to carry out this task – their time is best spent at the magistrates' Court (McConville et al. 1994, p.42). All clerks seemed to 'learn' that criminal clients were not worthy of a great deal of respect and came to see criminal practice as being geared towards the production of guilty pleas (p. 189). Further, they found that solicitors and clerks often did not check whether there was a factual basis for plea of guilty and that their desire to get guilty pleas means that solicitors would sometimes accept a plea of guilty even if this was completely at odds with the rest of what the client was telling them. Regarding the role of the barrister, McConville et al. found that the implicit purpose of conferences with counsel was to persuade the defendant of the likelihood of conviction and the advantages of a guilty plea (1994, p. 193).

There is, however, also research which contradicts the findings outlined above, both from the 1970's and more recently. In McCabe and Purves' study, a total of 112 defendants in 90 cases in the sample changed their pleas. Forty-eight pleaded guilty to the whole indictment as it stood, and 64 came to an agreement with the prosecution whereby charges were reduced or dropped in exchange for plea of guilty, but despite identifying this as plea bargaining, McCabe and Purves' main conclusion was the importance of pragmatism and realism in making the decision to change plea. They could not find evidence that any of the sample was 'substantially innocent' or that the police had behaved improperly. (McCabe and Purves, 1972). Furthermore, in the aftermath of *Negotiated Justice*, Seifman (1980) carried out his research on plea bargaining in England. He agreed with critics that *Negotiated*

*Justice* represented a one-sided view of the plea-bargaining process and that defendants' statements were not adequately corroborated by the researchers.<sup>50</sup> Seifman argued that, on the basis of his findings, there were only infrequent, isolated incidents of innocent defendants being pressurised into pleading guilty, with no evidence that it presented a significant problem. Most recently, Tague has published the results of an empirical study which would suggest that it is now not financially or professionally in barristers' interests to encourage guilty pleas and their interests are to attract briefs, maximise income and avoid sanction, each of which Tague argues are best served by taking cases to trial (Tague 2006, 2007).

The existing empirical evidence thus provides strong indications that plea bargaining is common and that it may be a significant cause of late guilty pleas, and therefore of cracked trials. Nonetheless, the body of evidence is small, and studies have varied greatly in their ethical evaluations of the practice and on the issue of whether innocent defendants may be induced to plead guilty by plea bargains, and the most recent empirical study (Tague 2006, 2007) calls into question some previous findings and assumptions. There is clearly a need for a great deal more research into the causes of late guilty pleas, and the nature and extent of plea bargaining as one of those causes.

### **1.9 Plea bargaining, criminal justice policy and the 'rebalancing' agenda**

Administrative efficiency has become an overriding concern of the criminal justice system, and one which has been used to rationalise increasing inducements for defendants to plead guilty, without any real consideration of the academic literature which highlights the perils of this course of action. This concern has manifested itself recently in the graduated sentence discount but is also to be seen in recent criminal justice policy on guilty pleas more widely, and has culminated in what is perhaps the most blatant attempt to encourage guilty pleas; the legitimisation of sentence canvassing.

The 1993 RCCJ in some ways marked a watershed when it accepted that it was naïve to suppose that the innocent never plead guilty, but that this needed to be weighed against the benefits to the system and to defendants of encouraging those who are in fact guilty to

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<sup>50</sup> Nonetheless, Baldwin and McConville went to considerable lengths to justify their methodology and approach to the study, in particular their decision to base their findings on what defendants told them (they also used other methods to triangulate their findings) and devote a section of their monograph to it (1977, pp. 1 – 17) as they rightly anticipated that this criticism would be levelled at them.

plead guilty (1993, at para. 42). This reasoning has been described as ‘breathtakingly bare’ (Field and Thomas 1994, p.3) and it is, from a due process perspective, startling that a Royal Commission on Criminal Justice would expressly prioritise encouraging guilty pleas over the protection of the innocent. Ashworth and Redmayne write that ‘one of the Royal Commission’s most conspicuous omissions was its failure to discuss the rights of defendants in any principled fashion’ (2005, p. 286) Before the Royal Commission had reported, the Director of Public Prosecutions, the Bar Council and the Attorney General were from the outset arguing for formal sentence canvassing and a clearer system of discounts for early guilty pleas to facilitate plea bargaining. The Bar Council had been advocating for sentence canvassing and a relaxation of the *Turner* rules for some time, and the General Council of the Bar set up the Seabrook Committee (1992) which published a set of proposals prior to the RCCJ. The Seabrook Report made several recommendations on plea bargaining and was fiercely criticised by McConville and Mirsky for the ‘violence’ it proposed to do to the adversarial system (1993, p.6). The report proposed that there should be a clear gradation of minimum sentence discounts, from 30% at committal to 10% after the first Court listing, that judges should be permitted to give indications of maximum sentences and that there should be greater use of formal pre-trial conferences in cases where it would be useful, which McConville and Mirsky argue requires defendants to unjustifiably disclose information which would undermine their rights to an adversarial trial (1993, p.7).

It came as no great surprise that the RCCJ proposed a relaxation of the *Turner* rules to permit the judge, at the defendant’s request, to indicate in advance the highest sentence he would impose for a guilty plea at that stage. This measure was implemented over a decade later as the *Goodyear* indication, but the proposal was not acted on at the time. The RCCJ had also proposed graduated sentence discounts to reward early guilty pleas to a greater extent than late pleas (again, this was not acted on at the time but was introduced by the SGC in 2004). McConville and Mirsky argued that by advocating sentence canvassing and graduated discounts, the RCCJ:

‘transform[ed] the meaning of guilt from one based upon an objective assessment of the weight of the evidence in a rational legal environment, to another dependant upon the attribution of guilt through routinised lawyering conducted in a coercive environment and justified in terms of the routinised processing of mass defendants, with the minimum expenditure of time and effort either on the part of the State or of private witnesses’ (1994, p.267).

Issues surrounding plea bargaining surfaced once more, albeit superficially, in the 2001 Auld Report. The Auld Report acknowledges that ‘some judges and defence advocates have continued to breach [the *Turner* rules] in different ways’ but that ‘[t]hey have no doubt been motivated for the best’ (para 94). It is interesting that contraventions of what were essentially (loose) guidelines designed to ensure the voluntariness of defendants’ pleas were deemed to have been ‘for the best’. Lord Justice Auld (at para. 112) did not share the view of the RCCJ that a system whereby judges could indicate to defendants both the maximum sentence on a plea of guilty and the possible sentence on conviction after trial would amount to unacceptable pressure. Auld skirts over the question of ‘plea bargaining’ itself, interpreted by his Report as situations in which the prosecution agrees to drop certain charges or substitute lesser charges in return for guilty pleas; the focus is very firmly on ‘advance indication of sentence,’ as though this and the concept of plea bargaining were entirely unrelated.

In 2002, following the Auld Report, the Labour government published its *Justice for All* White Paper. *Justice for All* is of particular interest in that White Papers tend to reveal more of the rationale behind policy-making than Acts of Parliament ever can and in this sense is more instructive than the 2003 Criminal Justice Act it led to. The first paragraph of the foreword to *Justice for All* reads:

‘The people of this country want a criminal justice system that works in the interests of justice. They rightly expect that the victims of crime should be at the heart of the system. This White Paper aims to rebalance the system in favour of victims, witnesses and communities and to deliver justice for all, by building greater trust and credibility...Whilst we need to ensure that there is a fair balance of rights between defence and prosecution, we are determined to ensure that justice is done and seen to be done.’

It does not require a great deal of reading between the lines of this foreword to see that the government’s stance is that defendants have enjoyed too many rights for too long and that the criminal justice system ought to start favouring good, honest, law abiding citizens. It is hard to see how the system could be ‘rebalanced’ in favour of victims without rights being removed from defendants – despite the assurance of a ‘fair balance’. The White Paper goes on to outline a range of what are essentially pro-prosecution measures, including the giving

of sentence indications to encourage early guilty pleas.<sup>51</sup> *Justice for All* proposes that the process will be geared towards ‘convicting the offender as early as we possibly can, and minimising opportunities for anyone in the system to impede all efforts to achieve that’. This is similar to the promise later in the paper, that new procedures will ensure that cases get to trial quickly, ‘with reduced chances of the accused ‘playing the system” (p.6). *Justice for All* takes the stance that criminals manipulate the system by pleading guilty at the last minute; deliberately wasting the taxpayer’s valuable resources. As a result, measures to encourage ever earlier pleas of guilty are seen as necessary. It is difficult to see what evidence this stance may have been based on; the academic literature certainly does not support it.

In addition to *Justice for All*, the second *Criminal Case Management Framework*, published in July 2005 is also of relevance. It was designed to act as a guide to practitioners on how cases should be managed most effectively and efficiently from pre-charge through to conclusion, and was intended to complement the introduction of the Criminal Procedure Rules in April 2005. It is a 193 page handbook on how to process cases more quickly and with as little expenditure as possible. There is a great emphasis on making effective use of pre trial hearings such as the plea before venue procedure and hearings where a main objective is ‘to allow the court to take an early guilty plea’.<sup>52</sup> The purpose of the Framework seems to be to help practitioners ensure that guilty pleaders progress swiftly through the system and those entering not guilty pleas are to be given as many (early) opportunities as possible to change their minds; thus avoiding the time and expense of a trial.

The Criminal Case Management Framework complements the Criminal Case Management Programme (CCMP), designed to deliver the goals set out in *Justice for All*. The CCMP comprises of three main elements; the charging programme, the victim and witness care scheme, and most relevant to plea bargaining, the effective trial management programme (ETMP). The overriding aim of the ETMP was to help deliver the government’s requirement of a 27% reduction in the number of ‘ineffective’ trials by the end of the 2005 to 2006 year. The ETMP emphasises the importance of efficient case progression, tracking and the importance of the defendant’s appearance at court hearings. This it attempts to achieve through the early communication of the ‘benefits of cooperating with the process’

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<sup>51</sup> Other measures include allowing the court to be informed of previous convictions where appropriate, allowing hearsay evidence where appropriate, giving witnesses increased access to original statements at trial, and extending the prosecution’s right to appeal against bail.

<sup>52</sup> Part 11.11.1(a).

and improved enforcement procedures for non attendance. The ETMP was trialled in five test areas in 2003 and in 2005 was implemented nationwide, and in most court centres, ineffective trials have been reduced (the average ineffective trial rates for England and Wales have fallen from 20.6% in 2003/04 to 12% in 2006/07; see Crown Court Annual Reports 2003/2004; 2006/2007).

The introduction of sentence canvassing in the Criminal Justice Act 2003, and the clarification of the procedure in the case of *Goodyear* was a further, fundamental, step in the formalisation of practices which seek to encourage guilty pleas and maximise administrative efficiency by avoiding trials where possible. The previously leading case of *R v Turner* (1977), as well as clarifying the extent to which a barrister could encourage a defendant to plead guilty also stated that ‘the judge should never indicate the sentence he is minded to impose’. The one exception to this was that it was permissible for a judge to say that whatever happened, the sentence would or would not take a particular form, for example custodial, suspended or non custodial. This element of *Turner* has been overruled now that the Criminal Justice Act 2003 provides for the ‘advance indication of sentence’ following support for such a procedure in the Auld Report, and in *Goodyear* [2005] the Court of Appeal laid down guidelines as to how sentence canvassing should work in practice in the Crown Court.<sup>53</sup> The Court held that a judicial response to a request for an indication of sentence from the defendant did in fact not constitute inappropriate judicial pressure on the defendant but that if the defendant did not seek an indication, it would be inappropriate for the judge to give one.

The Court of Appeal held that:

- (i) any advance indication of sentence to be given by the judge should be confined to the maximum sentence if a plea of guilty was tendered at that stage;
- (ii) once an indication had been given it remained binding on the judge who had given it and any other judge who became responsible for the case;
- (iii) if, after a reasonable opportunity to consider his position in light of the indication, the defendant did not plead guilty, the indication ceased to have effect;
- (iv) the hearing should take place in open court;
- (v) the new procedure would not apply in the magistrates’ Court;
- (vi) defence counsel should not seek an indication without written, signed authority

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<sup>53</sup> *Goodyear* [2005] EWCA Crim 888.



from the defendant;

(vii) the judge should never be invited to give an indication on the basis of what would appear to be a plea bargain and,

(viii) prosecution counsel should not say anything which created the impression that the sentence indication had the support of the Crown.

In the Court's judgement, there was a significant distinction between a sentence indication given to a defendant who had deliberately chosen to seek one from the judge and an unsolicited indication directed to him from the judge and conveyed by counsel. It would however be naïve in the extreme to suppose that defendants would request a sentence indication on their own initiative without the input of counsel. Once the defendant has an indication of a lighter sentence, counsel is in a stronger position than previously (given that it is an 'official' indication) to give advice in the 'strong terms' that *Turner* (1977) permits that a plea of guilty would be to the defendant's advantage.

The ostensible objective of the guidelines in *Goodyear* was not to formalise plea bargaining, but 'to ensure common process and continuing safeguards against the creation or appearance of judicial pressure on the defendant' (Thomas 2005, p.661). The Court stated that 'a judge should never be invited to give an indication on the basis of what would appear to be a 'plea bargain'. He should not be asked or become involved in discussions linking the acceptability to the prosecution of a particular plea or bases of plea and the sentence which might be imposed and he should not be asked to indicate levels of sentence which he might have in mind depending on possible different pleas' ([2005] EWCA 888 at 67). This denial that advance indication of sentence has anything to do with plea bargaining is difficult to rationalise, and could only be on the very narrowly conceived basis that a response to a request is just that, and not a bilateral exchange of concessions in a stricter sense of a 'bargain', but what is a formal, judicial indication of a light sentence in exchange for a guilty plea, if not a plea bargain?<sup>54</sup> Most recently, the government has moved towards a less closeted encouragement of plea bargaining in certain cases of serious and organised crime, and in fraud cases, unthinkable less than a decade ago (discussed at Chapter 1.4 above). This type of criminal activity is quite removed from 'ordinary' criminal processes though, and the criminal justice system still remains a long way from engaging with the academic literature and openly acknowledging the routinised use of plea bargaining. The

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<sup>54</sup> Even the fraud consultation document considering a system of plea negotiation, published by the Attorney General's Office, describes *Goodyear* as 'a significant step towards what is proposed in the draft Framework' (2008, p. 35).

approach taken by criminal justice policy to cracked trials and plea bargaining is, to a large extent, mirrored by developments in criminal justice more generally, in which new Labour's promise of evidence based policy has not come to fruition and the RCCJ's reasoning on criminal justice, described by Field as being 'based on a mixture of influences, some certainly practical, but others based on half-articulated statements of principle and/or rather particular readings of the research evidence' (1994, p.121) has remained the norm. Political considerations based on government perceptions of public opinion have become ever more powerful forces behind criminal justice policy, and Tonry has written that 'criminal justice policy making in England and Wales has been more theatrical than substantive...tabloid front pages and political advisors have had more influence on government proposals and policies than have criminal justice professionals, systematic evidence or subject matter experts' (2004, p.3).<sup>55</sup>

The increasingly actuarial, target driven motivations behind criminal justice policy (Sanders and Young comment that 'efficiency, effectiveness and economy became the trinity which public sector officials were required to worship' (2007), p.35) and a preoccupation with 'bringing offenders to justice' has also had the effect of placing pressure on the CPS to increase conviction rates. This applies particularly to offences such as rape and domestic violence, where there is a perception that offenders 'get off' all too easily. The Crown Prosecution Service's annual report in 2003 had as one of its key aims 'increasing the number of crimes for which an offender is brought to justice, to 1.2 million by 2005/2006', and the 2007 /2008 CPS annual report shows that this aim was not only met but exceeded, with the conviction of offenders for almost 1.4 million offences by the end of December 2006.<sup>56</sup> Conviction targets no doubt result in additional incentives to prosecutors to plea bargain, and perhaps to accept guilty pleas to inappropriate offences, or to allow weak cases to proceed, in order to ensure that conviction rate targets are met (see for example McConville, Sanders and Leng 1991). Langbein's analysis of why plea bargaining rose to dominance historically is perhaps just as plausible an explanation of its continued contemporary rise: he argued that it emerged as the response to increasingly inefficient, evidentially complex jury trials because it allowed the 'sanctified' status of the jury trial to remain, making it possible to circumvent it in the majority of cases whilst still retaining the principle, rather than openly moving to an inquisitorial or other non-jury system (1979, p.269). This engenders a situation in which various administrative pressures on all parties to plea bargain, and upon defendants to plead guilty, are all the more insidious for being

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<sup>55</sup> See also Newburn and Rock (2006), Downes and Morgan (2007).

<sup>56</sup> Accessed at: <http://www.cps.gov.uk/publications/reports/annualreport04.html>

hidden behind a façade of due process and commendable aims such as ‘bringing offenders to justice’.

In many respects, the 2003 Criminal Justice Act embodies much of new Labour’s criminal justice agenda, and Gibson has described it as ‘by far the most wide-ranging statute of its kind of modern times’ (2004, p.9), but the sheer volume of criminal justice legislation in recent years is testament to the extent to which the government has attempted to ‘re-balance’ the criminal justice system.<sup>57</sup> Sanders and Young argue that through this legislative programme, the Labour government has ‘dismantled suspects’ rights and increased police powers at an even greater rate’ than preceding Conservative governments (2007, p.18) and that the drift towards crime control has accelerated (*ibid.*, p.26). Sanders and Young also write that with respect to plea bargaining (as well as criminal justice policies more generally) ‘the crime control victory sought by the Runciman Commission has now been achieved...the due process rump is largely presentational’ (*ibid.*, p.437). The ostensible justification for the increase of crime control measures has been re-balancing the system in favour of victims, and sparing victims and witness the ordeal of a trial had always been an element of the rationale for the sentence discount and plea bargaining, as discussed earlier in this chapter. However, the victims’ or law abiding citizens’ rights based agenda has provided little in the way of tangible benefits to victims or the wider community and has instead become little more than a gloss on measures which deprive defendants of basic entitlements (Sanders and Young 2007, pp.648 - 673; Hoyle and Zedner 2007).

The prioritising of crime control values over defendants’ rights has inevitably contributed to a legal framework in which the defendant’s right to put the prosecution to proof has been eroded, and there are increasing pressures to plead guilty, and to do so as early as possible in order to avoid attracting the penalty of a more severe punishment. Defendants are expected co-opt themselves into their own prosecutions in order to spare themselves greater punishment, as evidenced by the Criminal Justice and Public Order Act 1994’s erosion of the right to silence and compulsory defence disclosure introduced by the Criminal Procedures and Investigation Act 1996. As Sanders and Young write of the means by which a defendant can enhance his sentence discount, ‘this principle is part of a wider

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<sup>57</sup> Key legislation enacted by the Labour government since 1997 includes: the Crime and Disorder Act 1998, the Criminal Justice (Terrorism and Conspiracy) Act 1998, the Youth Justice and Criminal Evidence Act 1999, the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act, the Anti-Social Behaviour Act 2003, the Criminal Justice Act 2003, the Domestic Violence, Crime and Victims Act 2004, the Prevention of Terrorism Act 2005, the Serious Organised Crime and Police Act 2005 and the Terrorism Act 2006.

strategy of encouraging various forms of cooperation from suspects...[which]...in turn undoubtedly helps secure the mass production of guilty pleas' (2007, p.387). The state provides the greatest sentence discount incentives to plead guilty for those who put their own safety at risk, and to provide additional pressures to plead guilty to defendants in such situations is, arguably, unethical (Sanders and Young 2007, pp.433 – 434). This notwithstanding, there remains an illogical perception that in being 'rewarded' by a sentence discount, defendants are playing the system, that they are almost mocking their victims in doing so, and that their scope to do so needs to be curtailed, whilst still ensuring as many guilty pleas as possible. It is ironic that a defendant, having pleaded guilty and therefore complied with what is expected of him and spared the state the resources of a trial, is then promptly 'blamed' for the resulting cracked trial and the 'wasted' resources - unless he pleads guilty at the earliest possible stage; a stage at which he may not even have been aware of the evidence against him.

#### **1.10 Conclusions**

This chapter has outlined the key issues relevant to cracked trials, plea bargaining, and their relationship, as well as outlining the relevant criminal justice policy. There is a considerable body of literature (albeit predominantly from the USA) which suggests that behind high guilty plea rates lies the phenomenon of the negotiated plea. However, as this chapter has shown, the issue is still sensitive in England and Wales; neither the legal establishment nor policy makers seem willing to engage with the likelihood that the 'problem' of the cracked trial requires a more thorough analysis of its underlying causes and instead focus on crime control measures designed to reduce the number of adversarial trials. The unwillingness of the criminal justice system to examine cracked trials more closely, and to assume they are caused by defendants 'playing the system', may lie in the fact that academic studies, prevailing academic opinion, and the anecdotal experiences of lawyers, all point very strongly to the fact that plea bargaining is widespread and creates pressure to plead guilty; even scratching the surface of the problem of the cracked trial could reveal this, and open a Pandora's box. This 'ambiguous, unsettled and hypocritical' attitude to plea bargaining (Darbyshire 2000, p. 897) has stunted the development of research, potentially of use to courts and policy makers, which explores cracked trials, and regardless of what the causes of cracked trials may be, a greater, and genuine understanding of them would be required in order to reduce them if that is to be the aim of the courts.

## **CHAPTER 2**

### **METHODS**

#### **2.1 Introduction**

Having analysed the key issues which relate to cracked trials and plea bargaining in the preceding chapter, Chapter 2 outlines the research questions adopted by this study in order to explore the issues empirically. The chapter sets out the overall research design and methods used; it reviews the methods used by previous similar studies and explains why the methods used in this study were chosen in preference to others. In carrying out this piece of research considerable delays and other difficulties in accessing appropriate data were experienced; these issues, and how they affected the methods eventually employed and the scope of the data collected are also discussed. Documentary analysis of CPS case files and interviews with legal professionals were the primary methods used, and the general nature of this data is outlined. Finally, the difficulties which may be involved in interviewing those in positions of authority, the extent to which this actually presented difficulties, and ethical issues in researching sensitive topics are also considered.

#### **2.2 Research Questions**

The empirical element of this study was designed to:

- (i) quantify the number of, and reasons for, cracked trials within a specified sample of cases;
- (ii) identify and explore the features of cracked trials, in particular those caused by late guilty pleas;
- (iii) identify and explore the nature of cases in which some form of plea bargaining may have led to a cracked trial; and
- (iv) explore legal professionals' perspectives on cracked trials and plea negotiations.

The key question the research design addresses is the why so many defendants change their plea to guilty on the day listed for their trial, or the prosecution offers no evidence, resulting in a cracked trial. The research is also designed to explore more generally the extent to which negotiated pleas play a role in cracked trials, as identified by previous

literature. As discussed in Chapter 1 of this thesis, there has been little research into the relationship between cracked trials and plea bargaining, and any exploratory approach to cracked trials requires a consideration of negotiated pleas.<sup>58</sup> The data collection was from the outset approached from a broad perspective, which considered the reasons for cracked trials generally, without creating a narrow focus on negotiated pleas. This guarded insofar as possible against the potential danger of results which exaggerated the nature or extent of plea bargaining. Although the research was designed in the knowledge that previous studies had identified negotiated pleas as a feature of cracked trials and that it warranted further exploration, there was potentially a range of personal, administrative, case management and local court pressures which could play a role in the generation of cracked trials, which also required consideration.

This study also considers the role of the lawyer in cracked trials, particularly the role of the defence lawyer in late guilty pleas. Much of the previous research has examined the importance of the relationship between lawyers' advice and late guilty pleas (McCabe and Purves 1972; Bottoms and McClean 1976; Baldwin and McConville 1977; Seifman 1980; Zander and Henderson 1994; McConville et al 1994, Tague 2006, 2007). The role that lawyers play in cracked trials and plea formation is therefore an area of interest and also one which requires particular attention from a methodological perspective.

## **2.3 Methods used: documentary analysis**

The two methods most clearly suited to the aims of this study were therefore a documentary analysis of case files, complemented by interviews to add depth and context to the data contained within the files.<sup>59</sup>

### **2.3.1 Previous studies' use of documentary analysis**

Some, but by no means a great deal of the previous research into cracked trials or plea bargaining in England and Wales has made use of some form of documentary analysis as a research tool. McCabe and Purves (1972) examined police and court documents, Bottoms

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<sup>58</sup> Plea bargaining has been identified as a factor of varying significance in late guilty pleas by several studies (Dell, 1971; McCabe and Purves, 1972; Bottoms and McClean, 1976; Baldwin and McConville, 1977; Seifman, 1980; and Zander and Henderson, 1994). Their findings are discussed in Chapter 1.

<sup>59</sup> A consideration of the methods which were unsuited to this study is provided at Appendix C.

and McClean (1976) studied three months of records as a preliminary to determine the relative numbers of different types of cases they later analysed, and Baldwin and McConville (1977) had committal papers examined by legal professionals to make judgements on strength of cases. However, bar (to a limited extent) McCabe and Purves (1972), none of the studies in England and Wales which focused on cracked trials or negotiated pleas used a systematic analysis of contemporary completed case files as a research tool. McConville et al. examined case files as part of their 1994 *Standing Accused* study, but their focus was much wider ranging, and was confined primarily to the work of solicitors, not barristers. The examination of case files provided an invaluable quantitative dimension to this study, as well as being (an unexpected) source of qualitative data. When combined with the additional qualitative material from interviews, these three strands of data have complemented and mutually reinforced each other.

Files held by the CPS were chosen in preference to defence files, as using CPS files meant that a broad cross section of files, stored chronologically, could more easily be accessed; obtaining defence files would have resulted in files from a very limited range of solicitors' firms or negotiating access to a large number of firms, which may have been unfeasible.

### 2.3.2 Gaining access to Crown Prosecution Service files

The access to case files granted by the CPS, and the assistance of employees of the CPS in facilitating access to those files, and physically locating them was crucial to this study and a great deal of gratitude is owed to the organisation and those individuals within it. The process of gaining access was however lengthy, and once access had been agreed, there were practical impediments to carrying out the data collection as swiftly as had been hoped; both factors resulted in unavoidable modifications to the number of files which could be examined. Between first contacting the CPS to request access and being granted access in principle, nine months had elapsed, and a further five months passed before it was possible to start data collection. This delay was a result of waiting for security clearance, and for the CPS to extract the information to compile a list of case reference numbers from the relevant courts, over a suitable time period. It proved difficult to select a time period which was long enough to contain sufficient cases, but recent enough that the files had not been sent to remote storage. The data collection itself progressed at a slower pace than had been anticipated, for a variety of reasons. One issue was that a room within the CPS offices had to be booked for my use on a day by day or week by week basis, and when, as was often the case, all available rooms had already been booked, I was unable to carry out any work.

On those days when I was able to book a workspace, I was reliant on CPS support staff to locate the closed files from what was known as the ‘dead room’; if these staff had other tasks to carry out, or had been unable to locate the relevant files, I was left without sufficient files from which to extract data.

### 2.3.3 Case selection

The cases to be analysed were selected by non-random sampling, the process of which is described below.

The CPS had provided me with a list of case numbers which I was informed represented a continuous, chronological sample of cases finalised at Manchester Minshull Street Crown Court and Manchester Crown Square Crown Court between June and August 2006.<sup>60</sup> The intention had been to collect data from each of these cases (around 200 from each court) but to accommodate for the delays encountered (in part the practical problems outlined above, but also because the files yielded richer data than had been anticipated, which therefore took longer to record), this figure was revised and it was decided that only cases from Minshull Street would be analysed. After data from 81 cases on the June to August list had been recorded, it transpired that some of the files from the list had erroneously been taken for remote storage, and I was provided with an additional list of cases finalised at Minshull Street between September and December 2006; 38 cases were drawn from this list.

In total, data were collected from 119 cases, out of a possible 560 cases which were finalised at Minshull Street between June and December 2006.<sup>61</sup> The CPS in Greater Manchester processes cases within a structure of six geographical units loosely based on the locations of committing magistrates’ courts, and the files within the sample were drawn from three of those units (Salford, Sale and Stockport). Working teams at the CPS headquarters in Manchester are organised by geographical unit and retrieving cases necessitated liaising with managers of that particular unit; the three units in question proved to be those which were able to spare the time of an administrative assistant to locate case files for me. The total number of cases finalised at Minshull Street from the

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<sup>60</sup> Finalised cases are those which have proceeded through all stages to either acquittal or sentencing on all counts.

<sup>61</sup> Data on the total number of cases finalised at Minshull Street were obtained from the Performance Directorate of the Court Service.



Salford, Sale and Stockport units combined was 317, and the study's sample of 119 therefore represents 37.5% of the total number of cases in the population of three units sampled, and 21.3% of the wider sampling frame of all 560 cases to have been finalised at Minshull Street between June and December 2006.<sup>62</sup>

#### 2.3.4 The nature and content of the files

The 119 cases from which data were collected involved a total of 151 defendants, and it was the defendant rather than the case that has been taken as the unit of analysis.<sup>63</sup> Of the 151 defendants, 75 (49.6%) had cracked trials, where a cracked trial was defined as a case in which all counts were disposed of by means of a guilty plea or the prosecution offering no evidence. The prosecution files contained a wealth of information potentially relevant to cracked trials; including the police records of the offence, witness statements, correspondence between the prosecution and defence, and between the police and the prosecution, the details of the lawyers involved in the case, the defendants' personal details, records of the defendants' previous offences, and of course the indictment, and details of pleas and sentences where relevant (the data collection form used is reproduced at Appendix A).

Unexpectedly, the most interesting and useful source of information proved to be the CPS's Crown Court Minute Sheet contained within each file, and updated (generally in extremely thorough detail) by CPS caseworkers at each stage of the case. It was this part of the file from which it was often possible to establish the reason for a change of plea guilty to the indictment as it stood, why a plea of guilty to lesser or fewer charges had come about, or the reasoning behind a CPS decision to offer no evidence in respect of a particular case.

The minute sheet often provided contextual, qualitative data about the reasons for cracked trials in individual cases, supplementing the quantitative data which had originally been anticipated from the files. In the vast majority of files, all the material was present; only rarely was information missing, and on those occasions where it was, it was often possible

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<sup>62</sup> The figures for individual units break down as follows: Salford: 112 finalised in total, 50 in sample; Sale: 88 finalised in total, 26 in sample; Stockport: 117 finalised in total, 75 in sample.

<sup>63</sup> CPS files are held for each individual case, not for each defendant, but where there were multiple defendants the file would contain individualised information where relevant.

to establish the relevant information using an alternative source.<sup>64</sup>

### 2.3.5 Analysing case file data

The quantitative data collected and recorded on the data collection forms was coded and entered into an SPSS database, and analysed using univariate descriptive statistics and bivariate statistics. The qualitative data recorded on data collection forms was collated and reproduced as one document and analysed thematically.<sup>65</sup>

## 2.4 **Methods used: Interviews**

Notwithstanding the unexpected qualitative data which could be extracted from the CPS files, this study benefited greatly from the additional depth and context interviews were able to bring to it. As discussed at 3.2 above, lawyers' experiences and perceptions of the reasons for cracked trials was a significant focus of this thesis from the outset, and interviewing a range of legal professionals made it possible to provide an element of empiricism in the discussion of the lawyer's role in late guilty pleas. Baldwin and McConville (1977) came under fire for not interviewing lawyers, and taking defendant's accounts at face value (see for example Seifman 1980 and the response to *Negotiated Justice* cited at p. viii of the study), whereas Tague's recent research (2006, 2007) can be criticised for only approaching cracked trials from the perspective of the barrister, and taking these accounts at face value.<sup>66</sup> In carrying out varied interviews, as well as collating data from case files, this study attempts to bring together a range of data so as to gain a broad picture.

### 2.4.1 Access to interviewees

In total, ten interviews were conducted; four barristers, one solicitor, two circuit judges, two crown court case progression officers and one representative from the criminal defence service. Potential interviewees were chosen by a variety of means. The Bar Directory, available online, was used to search for barristers practicing at the criminal Bar

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<sup>64</sup> For example, if the record of previous convictions was missing, these were also detailed in the probation report.

<sup>65</sup> A larger data set, which it did not prove possible to analyse, was also obtained; details are provided at Appendix D.

<sup>66</sup> Baldwin and McConville (1977) did however go to considerable lengths to ensure their data had as much validity as possible, see in particular pp. vii – xii and pp. 59 – 82.

in Manchester.<sup>67</sup> Fifty of those barristers were chosen at random, and written to, followed up with phone calls; this resulted in just four interviews. It had initially been hoped to carry out more interviews with barristers, but it proved difficult to do so within the timeframe of this study (exacerbated by the fact that criminal barristers in particular, spend much time at court making it difficult to contact them, save through their clerks).<sup>68</sup> This notwithstanding, a great deal of invaluable data was transcribed from these four interviews.

One interviewee suggested the names of two circuit judges, who he felt might be amenable to speaking to me, this proved to be the case, and they were both interviewed. For a broader perspective of the issues as they affect lawyers, one solicitor was interviewed (after contacting forty by email and telephone, from the list of solicitors practising criminal law in Manchester which it was possible to compile using the Law Society's online search facility ([www.lawsociety.org.uk](http://www.lawsociety.org.uk))). The broad perspective the study aimed at was developed further by speaking to two members of Manchester's Crown Court case progression teams, and a representative from the Criminal Defence Service.

It had been decided at a relatively early stage of this research not to collect data from defendants or those convicted of criminal offences, primarily for practical reasons. Access was granted by the Prison Service on a national level to interview prisoners in custody; this took nine months, and the terms of access still needed to be negotiated with local prisons individually, with no guarantee that it would be granted. Carrying out this additional element of the research would have been overly time consuming and was ultimately beyond the scope of this thesis. It is however hoped that interviews with defendants or convicted prisoners can be carried out at a later date to supplement the existing results of this project.

#### 2.4.2 Interview structure and content

The most fitting style of interview was the semi-structured interview, which minimised the disadvantages of other methods whilst retaining some of their advantages. This was the primary method was used by Baldwin and McConville (1977), and Bottoms and McClean (1976) also used semi-structured interviews in addition to observation. Semi-structured interviews allow for each interview to have a similar focus and achieve some consistency in

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<sup>67</sup> The directory was part of the Bar Council's website but is now part of Legal Hub, [www.legalhub.co.uk](http://www.legalhub.co.uk).

<sup>68</sup> Tague (2007) encountered similar problems and refers to only receiving two responses to questionnaires sent out to all members of the Criminal Bar Association (n.2).

the kind of data gathered; making it capable of being subjected to meaningful analysis. Interviewees were asked carefully phrased questions about the reasons for cracked trials, late guilty pleas and their perceived influence on plea in general terms, avoiding terms such as 'bargain' or 'negotiation'. Plea bargaining is a grey area within the law and professional ethics and the phrase itself carries with it slight connotations of wrongdoing which were avoided. The interviews varied in length and format; all were face to face, bar one which was conducted over the telephone, and seven of the ten were recorded. The telephone interview was one of those not recorded, but detailed notes were taken during and after the conversation. The other two interviews which were not recorded took place at the same time as a group interview, in a noisy public place; the quality of the recording would have been insufficiently clear, so again detailed notes were taken during and after the interview. The shortest interview lasted for fifteen minutes, and the longest for 45 minutes; with an average duration of 25 minutes.

#### 2.4.3 Analysing interview data

Interviews were recorded on a digital voice recorder, transferred to a PC, then transcribed and, as there were a relatively small number of transcripts, they were analysed thematically and without the need for qualitative software (see for example Mason 1996, p.137).

### 2.5 **Researching the 'locally powerful'**

Baldwin has written that 'Judges, lawyers, and other court personnel have proved in the past to be almost uniquely resistant to social research' (2000, p. 237) and that 'studying the way that the criminal courts work remains a very tricky undertaking' (2000, p. 238). A number of researchers have highlighted the problems which can arise when researching what Bell (1978) refers to as the 'locally powerful'. Punch comments that 'researchers have rarely penetrated to the territory of the 'powerful'...and that field studies often focus on marginalized groups, referred to by Punch as 'the so-called 'nuts and sluts'' (1986, p. 25). Baldwin and McConville, writing of the difficulties they encountered researching *Negotiated Justice*, warn that 'no researcher who trespasses on this difficult terrain can expect an easy passage' (1978, p. 228 ). Baldwin comments that following *Negotiated Justice*, he and Mike McConville were described as being 'the legal equivalent of Salman Rushdie' by Sir Thomas Bingham (2000, p. 248). Evidently, there are some potential difficulties to be aware of when researching lawyers, particularly when the research relates to a relatively controversial topic such as plea bargaining.

The potential difficulties associated with research on groups or individuals who enjoy a certain status are threefold. Firstly, groups such as lawyers are less likely to consent to take part in research, either because they are genuinely too busy or because they view the research as unworthy of their valuable time, or fear that the research will reflect badly on them or challenge their authority. Secondly, that even if they do take part in research, those in a position of authority (perhaps in common with anyone) may present information in such a way that reflects well on themselves and / or not reveal their true beliefs and behaviour. Thirdly, that they may object to any conclusions drawn from the research, which applies particularly if the research is to be published. *Negotiated Justice* for example, was described by the Chairman of the Bar at the time as ‘a compilation of unsubstantiated anecdotes’ and as ‘no more than the tittle-tattle of the cells’ (*The Guardian*, 9<sup>th</sup> June 1977).

To minimise the impact of these problems, it has been suggested that a researcher needs to be as knowledgeable as possible about the work of the ‘locally powerful’ individual being interviewed in order to command a greater degree of legitimacy (Mungham and Thomas 1981, p. 90). Conversely, Punch points out the fact that a researcher who seems young and inexperienced is more likely to be perceived as non-threatening and may elicit sympathy and a willingness to help from respondents (1986, p. 24). One cannot make the assumption that lawyers will not speak frankly; they may welcome the opportunity to speak about their work and the issues which affect them (Mungham and Hoffman 1980). Even John Baldwin has written that ‘times are changing and new opportunities are opening up’ for researchers (2000, p. 238).

Mungham and Thomas further comment that some lawyers were more willing to talk honestly if researchers were able to indicate that they had some prior knowledge from other lawyers who had talked frankly and write that ‘[t]hus if we could include in interviews statements like ‘we have been told that’ or ‘we have often heard that’ and seeking confirmation or comment, we would frequently provoke opinion and ideas from those who had previously been taciturn or cautious. Being able to display previous knowledge in this way, has been a tactic used quite successfully in other studies of lawyers’ (1981, p.85). My experience was that a combination of approaches was necessary, and that it was essential to be flexible and respond to the interviewees’ lead at times. On occasion it was apparent that interviewees expected me to have very little knowledge of law or legal procedure, others quite the opposite, and it was necessary to adapt my questions and the nature of my rapport with them accordingly so as to elicit as much information as possible.

In each of the ten interviews, it was as soon as I mentioned that I had trained as a barrister that interviewees appeared to become not only more technical, but less guarded in their responses. As Fontana and Frey write, interviewers cannot ‘ignore contextual, societal, and interpersonal elements. Each interview context is one of interaction and relation; the result is as much a product of this social dynamic as it is a product of accurate accounts and replies’ (2000, p. 647) and this appeared to be very much the case.

Above all, it was necessary to approach the interviews in a sensitive way which did not explicitly refer to ‘plea bargaining’, at least unless interviewees had already used the term themselves, as did happen on occasion; defensive lawyers would have been unlikely to add much to the research. It was also necessary though to strike a balance between this sensitive approach, and asking direct questions of interviewees so as to ensure that all the interviews covered the issues within the remit of the research.

## **2.6 Ethics**

### **2.6.1 Interviews**

Plea-bargaining, whilst in some senses a legalistic or even a purely administrative concern is nonetheless a ‘sensitive topic’ which has been described as a study ‘in which there are potential consequences or implications, either directly for the participants in the research or for the class of individuals represented by the research’ (Sieber and Stanley 1988, p. 49). Renzetti and Lee (1993, p.4) emphasize sensitive research as being that which could ‘that seem to be threatening in some way to those being studied’. They identify that one area of sensitive research is where research ‘impinges on the vested interests of powerful persons’ (1993, p. 6) – such as solicitors and barristers who may be uncomfortable divulging information about the practice of plea bargaining. Plea bargaining is a grey area in the ethics of the legal profession, and there are no clear guidelines for lawyers to adhere to.<sup>69</sup> It raises fundamental questions about due process rights, the voluntariness of defendants’ plea and the adversarial nature of the trial process; lawyers are unlikely to want to be perceived as working in a manner which goes against these basic principles of the criminal justice system.

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<sup>69</sup> The ethical framework within which defending barristers operate is discussed further at Chapter 3.2

### 2.6.2 Confidentiality and anonymity

The confidentiality and anonymity of sensitive information was ensured by adhering to the following principles:

#### Case file data

- (i) Data collection took place on CPS premises, and no portion of the files was copied or removed
- (ii) Initially, some of the data collected still contained identifying information, so any data on paper were kept in a locked filing cabinet and Word documents were encrypted and password protected.
- (iii) Once analysed, the results no longer contained any identifying information any remaining identifying raw data was permanently deleted or destroyed.

#### Interview data

- (i) This data was contained in several formats; the initial MP3 recordings, which were then uploaded from the MP3 recorder onto a PC, and the transcriptions of those interviews in Word format.
- (ii) All data held on a PC, along with back up copies, were encrypted and password protected.
- (iii) Back up copies of data were stored on CDs and kept in a locked filing cabinet
- (iv) MP3 files on the voice recorder were deleted as soon as they were transferred to the PC and MP3 files on the PC were deleted once they had been transcribed.
- (v) I completed the transcription myself and data was anonymized during the initial transcription process.

## 2.7 **Conclusions**

Within the timeframe available, the methods chosen provided the most suitable means of exploring the study's research questions, and yielded a wide range of data. The extraction of quantitative data from CPS files allowed for an exploration of a range of quantifiable features of the cases which had potential applicability to the causes and features of cracked

trials. The qualitative data contained within those files, alongside the interviews conducted added depth and context to the data and made it possible to explore the reasons for individual cracked trials within the sample and greater depth, and to add to what is known about lawyers' perceptions of late guilty pleas and their roles in advising defendants on plea. It was regrettable that it was not possible to collect data from 400 case files as had been initially intended, but the data which was collected proved to be more than sufficient to achieve to aims of the research.

The following chapter draws together the existing literature as well as the relevant data collected by the present study, in order to provide an analysis of the role of defence lawyers in cracked trials and plea bargaining.



## CHAPTER 3

### THE DEFENCE LAWYER'S ROLE IN CRACKED TRIALS AND PLEA BARGAINING

#### 3.1 Introduction

The role of legal professionals has been identified by the literature as a central issue in the plea bargaining debate, as well as more generally in relation to plea formation and late guilty pleas, both in the UK and in the USA. This chapter provides a critique of that literature and develops the debate by drawing together the range of issues which currently affect the lawyer's role in cracked trials and plea bargaining in England and Wales, with reference to the empirical data gathered by this study where relevant.<sup>70</sup> As the focus of this thesis is the cracked trial and plea bargaining from the defendant's perspective, this chapter primarily considers the role of the defence lawyer.

A divide exists between the approach taken by the majority of academic studies which have tended to find that lawyers create or at least contribute to pressures upon defendants to plead guilty, and the criminal justice policy approach which has tended to view defence lawyers as 'uncooperative'. Rather than the concern that they may put pressure on defendants to plead guilty, the problem from a policy perspective is seen as one of lawyers assisting or encouraging defendants to plead guilty at a late stage in their cases, and thereby contributing to defendants playing the system in a 'frustration of the orderly preparation of both sides' case for trial' (Auld Report 2001, para 9).

This chapter reappraises and draws together the variety of issues contributing to, and raised by, the defence lawyer's role in plea formation in light of the existing literature, case law and professional codes of practice. This is supported by original data from interviews and case files where appropriate, and the three core issues addressed within this chapter are: (i) the legal and ethical framework; (ii) remuneration; and (iii) working relationships. Throughout, this chapter considers whether the features of the lawyer's role in the plea formation process are conducive to the defendant playing the system, or whether the lawyer's role is an element of pressures which are brought to bear upon defendants to

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<sup>70</sup> The data drawn upon for this chapter are primarily those gathered from the interviews conducted with legal professionals, and qualitative data extracted from Crown Prosecution Service files.

plead guilty.

### 3.1.1 Previous studies in England and Wales

Few studies to have considered cracked trials, late guilty pleas or plea bargaining have not at least touched on the role of legal professionals in the process of plea formation.<sup>71</sup> Most of the UK research in this field (in common with this study) focuses on the role of the barrister, rather than that of the solicitor. It is the barrister who comes into contact with the client at a later stage in the case, when more of the evidence has been disclosed, and is thus more likely to play a key role during the stage at which a plea is determined (see Zander and Henderson 1993; McConville et al 1994, p. 244). This has particular relevance to cracked trials, which occur at court, on the day of the trial, as this may also be the first time the defendant encounters his barrister (Zander and Henderson 1993, p.1732). Several studies have presented findings on the relationship between advice from counsel and late guilty pleas (Bottoms and McClean 1976; Baldwin and McConville 1977; Zander and Henderson 1993; Hedderman and Moxon 1992; McConville et al. 1994; Tague 2006, 2007). Most recently, Stephen and Tata (2006), Stephen, Fazio and Tata (2008) and Stephen and Garoupa (2008) have published findings on the lawyer's role in plea bargaining in Scotland from an economic efficiency perspective. Whilst Morison and Leith commented over fifteen years ago that 'the advocate is the one actor in the legal process who has escaped the scalpel of the investigative researcher' (1992, p.3), the emergence of a greater focus on the legal profession suggests that the scalpel may now be cutting somewhat deeper. Nonetheless, the body of empirical work in England and Wales dedicated to the lawyer's role in plea bargaining remains small, particularly as Baldwin and McConville's and Tague's research are the only studies to have focussed primarily on the barrister's role in defendants' guilty pleas.<sup>72</sup>

The literature has, however, provided some significant and revealing findings. Bottoms and McClellans' research found that in 68% of cases in which there was a late guilty plea, last minute advice from a defendant's barrister was the reason cited for the plea change. Of the

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<sup>71</sup> Indeed, as discussed in Chapter 1, some accounts attribute the rise of plea bargaining to developments in the role of defence lawyers. See for example Langbein (1978); Feeley (1997).

<sup>72</sup> In addition to the empirical studies, there is some significant literature in the area (for example Ashworth and Blake 1998, 2004; McConville 1998; McConville and Bridges 1993; Cape 2006), and literature whose focus is on the ethics of the legal profession more broadly conceived (see for example Boon and Levin 1999, Cranston 1995, Abel 2003, Nicolson 2005).

study's sample who were deemed to be 'possibly innocent', yet still pleaded guilty, the authors found that 34% had done so on their lawyers' advice (1976, p. 128). In Baldwin and McConville's sample of cases, out of the 48 cases where pressure from barrister was cited as the main reason for change of plea, Baldwin and McConville were of the view that in 20 cases, counsel acted within the confines of professional code, was careful in advising about sentence and gave advice in general terms with no false expectations held out. In the remaining 28 cases however, there was evidence that the advice was such that 'no reasonable person could say that it was fair or proper or that the final decision to plead guilty was made voluntarily' (1977, p. 45). Of these 28 defendants, 23 said they had been given no alternative but to plead guilty and that their barrister had 'instructed', 'ordered', or 'terrorised' them into pleading guilty (1977, p.46). Zander and Henderson's Crown Court Study (1993) found that in almost 70% of cases in which the defendant met his barrister on the day of the trial for the first time (and thus received direct advice from his barrister for the first time at that stage), the defendant entered a late guilty plea. Hedderman and Moxon interviewed 282 offenders convicted at the Crown Court and found that 37% stated that their final plea differed from the plea they had intended to enter and bar one, each of these defendants said that their solicitor or barrister had advised them to plead guilty (1992, p.23). McConville et al.'s *Standing Accused* (1994) although centred around the work of solicitors, also considered counsel's role. The authors found that pre-trial discussions between defence counsel and the defendant were characterised by '...discontinuous representation, hurried review of the evidence, and a structural propensity to encourage the defendant to avoid trial and instead plead guilty to the charge or some lesser negotiated offence' (p. 239). They also found that, whilst during the early stages of a case pressure to plead guilty was subtle, 'with the defendant's determination to go to trial being sapped rather than directly confronted (p. 252), conferences at court on the day of the trial were less relaxed, characterised by 'severe tension' (p. 254), and that the pressure on the defendant 'crystallise[d] in this one moment' (p. 255).

Stephen, in his recent research on the remuneration of defence lawyers in Scotland, argues that whilst plea bargaining has generally been regarded as efficiency enhancing by the literature on law and economics, this is not necessarily the case, particularly when the effects of the defence lawyer's incentives are taken into account. Stephen and Tata (2006), Stephen, Fazio and Tata (2008), and Stephen and Garoupa (2008) have argued that the defence lawyer's financial incentives can determine the outcome of a plea bargain in a way which is not necessarily consistent with the enhancement of efficiency, nor with defendants' due process rights.

However, Tague's research (2006, 2007) contradicts many of the previous studies' findings, albeit not entirely convincingly. Tague argues that barristers have three selfish interests: to attract briefs, to avoid sanction, and to maximise remuneration, and that upon closer examination, their pursuit of these interests inclines barristers towards trials, rather than guilty pleas (2007, p.3). A flaw in this argument is the assumption that these are the only goals or interests pursued by barristers and Tague fails to adequately consider competing factors such as the importance of maintaining working relationships or managing busy caseloads. A variety of conceptualisations of lawyers' competing interests have been put forward by the literature both in England and Wales and in the USA, yet Tague fails to acknowledge their potential significance.<sup>73</sup>

For the most part, the existing empirical literature on defence barristers and their lay clients' guilty pleas in England and Wales therefore provides compelling evidence that barristers may on occasion encourage the defendants they represent to plead guilty. However, much of the evidence is now outdated; both Bottoms and McClean's *Defendants in the Criminal Process*, and Baldwin and McConville's *Negotiated Justice* were published over three decades ago and the legal profession has undergone changes even in the 15 years since McConville et al's *Standing Accused* was published in 1994.

### **3.2 The legal and ethical framework**

The extent to which barristers can (or ought) to influence their clients' pleas is regulated by two key instruments; the *Turner* rules, and the Code of Conduct for the Bar of England and Wales.

#### **3.2.1 The *Turner* rules**

The facts of *Turner* ([1970] 2 Q.B. 321) were as follows: the defendant pleaded not guilty at his trial on a charge of theft; he had previous convictions, and was advised by counsel, in strong terms, to change his plea to guilty. After having spoken to the trial judge (with the defendant's knowledge), counsel advised that in his opinion a non-custodial sentence would be imposed if the defendant changed his plea to guilty, but if he persisted with a plea of not guilty, with an attack being made on police witnesses, and was convicted, there was a

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<sup>73</sup> See for example Blumberg (1967b); Alschuler (1968, 1975); Feeley (1973); McConville et al (1994); Fisher (2003); McConville and Mirsky (2005); Vogel (2007).

real possibility of a custodial sentence. Repeated statements were made to the defendant that the ultimate choice of plea was his, but the defendant had gained the impression that counsel's views were those of the trial judge; nothing was said to suggest that they were not and the defendant changed his plea to guilty. Turner subsequently appealed against his conviction, on the grounds that he did not have a free choice in retracting the plea of not guilty and pleading guilty. The Court of Appeal allowed the appeal, ruling that counsel could properly advise a defendant in strong terms to change his plea provided that it was made clear to him that the ultimate choice was his; but that, if the advice was conveyed as that of someone who has seen the judge, a defendant should be disabused of any impression that the judge's views were being repeated and that as the defendant may have felt that the views expressed were those of the judge he could not be said to have had a free choice in changing his plea, and that the plea of guilty should be treated as a nullity.

The Court of Appeal also took the opportunity to lay down some general guidelines as to the defence barrister's permitted role in advising on pleas of guilty. The resulting *Turner* rules can be summarized as five main points:

- (i) counsel must be completely free to do what is his duty, namely to give the accused the best advice he can – if need be in strong terms. This will often include advice that a plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case;
- (ii) counsel will emphasize that the accused must not plead guilty unless he has committed the acts constituting the offence charged;
- (iii) the accused must have complete freedom of choice whether to plead guilty or not guilty;
- (iv) there must be freedom of access between counsel and judge, but counsel must only ask to see the judge if really necessary – as justice must be administered in open court, and;
- (v) the judge should never indicate the sentence he is minded to impose. The one exception to this is that it is permissible for a judge to say that whatever happens, the sentence will or will not take a particular form.<sup>74</sup>

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<sup>74</sup> The last of these points has effectively been overruled by the decision in *Goodyear* [2005] EWCA Crim 888, in which the Court of Appeal outlined the procedure for advance indications of maximum sentences to be given.

The appeal in *Turner* was allowed only on the basis that the appellant had been given the impression that counsel's views came directly from the trial judge, and not because counsel had exerted any pressure on Turner. The Court of Appeal stated that the advice could be given in 'strong terms' and that the notion of a barrister exerting undue pressure on a defendant to the extent that a defendant would feel he had no choice in the matter was 'a very extravagant proposition, and one which would only be acceded to in a very extreme case' ([1970] 2 Q.B. 321 at 325). This suggests that even the authority intended to prevent undue pressure being exerted on defendants showed an unwillingness to countenance the possibility of that pressure originating in the advice of the defendant's own barrister on all but the rarest occasions.

### 3.2.2 Post-*Turner* case law

Since *Turner*, several noteworthy cases have considered appeals from defendants claiming to have been put under pressure to plead guilty. In *Herbert*<sup>75</sup>, the defendant had been jointly charged with his wife on drugs offences, and both pleaded not guilty. At the trial, Herbert was informed that if he pleaded guilty, the CPS would not proceed with the case against his wife. Herbert pleaded guilty but continued to maintain his innocence and later appealed on the grounds that the prosecution had put improper pressure on him and therefore rendered his plea a nullity. The appeal was dismissed; the Court held that counsel for both defence and prosecution had behaved properly and that Herbert had had the 'freedom to make his own choice'. It was stated that joinder of spouses, partners or other associates must not be used to secure a guilty plea from the main suspect but where such persons have been properly jointly indicted, it may often be in the public interest not to proceed against one of them if the principal offender pleads guilty and that the appellant can not have been said to have lost the power to have made a voluntary and deliberate choice.

*Roden*<sup>76</sup> concerned an appeal against conviction and sentence of life imprisonment for arson following a guilty plea. The appellant asserted that she had no recollection of committing the offences and had been persuaded to plead guilty following pressure from legal advisors. The appeal was dismissed notwithstanding the fact that immediately after pleading guilty she told the police officer in the dock she wanted to change her plea and defence counsel stated in mitigation that she could not remember making the fires, and had pleaded guilty only as a result of the strong circumstantial evidence against her. However, the Court of

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<sup>75</sup> (1992) 94 Cr. App. R. 230.

<sup>76</sup> [1995] C.L.Y. 1187.

Appeal held that Roden had not been influenced by undue pressure; the evidence against her was strong and although she intended to plead not guilty until the day of the trial and had hesitated considerably about her plea, that did not necessarily indicate undue pressure.

In the case of *Marshall (Leslie)*<sup>77</sup>, Marshall appealed against a conviction for murder. He contended that the judge had erred in refusing to allow him to vacate his guilty plea, arguing that there was evidence that he had lacked the requisite intention as he had consumed a quantity of alcohol prior to the killing and that the plea had only been entered following advice from counsel, which had been pressurising. The appeal was dismissed; it was held that there was no realistic prospect of the jury finding a lack of intent due to alcohol, and that the plea had been entered of the appellant's own free will; the only pressure being the factual situation that he himself had created.

*White (Leslie James)*<sup>78</sup> concerned a conviction for arson, and a convoluted series of problems with the defendant's representation. Counsel at the initial trial had withdrawn following a disagreement with White over advice to change his plea to guilty. At a new hearing, White was represented by different counsel and changed his plea on advice, but subsequently denied guilt at his pre sentence review interview, and counsel withdrew on the grounds that he felt unable to mitigate on the basis of the pre sentence review. White was then represented by a third counsel, who sought to have White re-arraigned so that he could enter a plea of not guilty. The application was refused and the judge allowed counsel to withdraw before proceeding to pass sentence. White sought permission to appeal, arguing that the sentencing judge had not exercised his discretion by making enquiries to satisfy himself that the defendant had not been pressurized into changing his plea. This application was also refused and it was stated that the strength of the prosecution case, which included the identification evidence of two police officers, and the fact that the plea was entered on the advice of experienced counsel, meant that permission would not be given for the guilty plea to be withdrawn.

In *Khan (Janghir)*<sup>79</sup>, the defendant appealed against a five year sentence following a plea of guilty to causing grievous bodily harm with intent. The day before the trial, the Recorder, in chambers, indicated that Khan would receive four years' imprisonment on a guilty plea and accordingly, he pleaded guilty. In this case, the appeal was allowed; it was held that the

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<sup>77</sup> [2000] WL 1841613.

<sup>78</sup> [2001] N.I. 172.

<sup>79</sup> [2004] WL 195977.

Recorder had erred by giving an indication of the likely sentence on a guilty plea (*Khan* was heard pre *Goodyear*) – irregularities following from such an error could result in the quashing of a conviction where the change of plea could be attributed to improper pressure or, alternatively, it could raise a legitimate expectation as to the type and length of sentence. Here, the court held that it would be wrong to break the judge’s promise and a sentence of four years’ imprisonment was substituted.

In *Bargery*<sup>80</sup> the appellant had pleaded guilty to using threatening behaviour contrary to s.4 of the Public Order Act 1986; the lesser alternative to affray. Bargery’s grounds of appeal were that the guilty plea was not entered freely and / or was equivocal. A co-defendant had pleaded guilty to same offence, and two meetings had taken place with the judge; which were attended by both counsel. In the first, counsel for the co-accused sought an indication from the judge as to whether a guilty plea might attract a community sentence. However, counsel for the appellant had clear instructions to fight the affray allegation whatever indications may be given and sought no indication. The judge indicated to counsel for the co-accused that he could not give such an indication. From an early stage, the CPS had indicated that they would be prepared to accept a plea to s.4 of the Public Order Act, but when counsel took further instructions from the appellant, since he could not assure him that a plea to s.4 was guaranteed to attract a community sentence, he still wished to proceed to trial. The co-defendant was anxious to accept the offer and agreed to give evidence against the appellant. A second meeting took place with the judge to inform him of that development and the judge indicated to all counsel that if both defendants pleaded guilty to s.4 he would not impose a custodial sentence. Counsel went back to the appellant to inform him of these two developments; firstly that he was much less likely to be acquitted at trial given the co-accused’s evidence against him, and secondly that he would receive a community sentence if he pleaded guilty to s.4; whereas affray would be virtually certain to attract a custodial sentence. Counsel stated that he pointed out that the offer very tempting but that he made it clear it was the appellant’s free choice. The appellant accepted the offer. On appeal, the court held that the judge’s indication should not have gone beyond an indication that the same type of sentence would be imposed regardless of the plea (again, this case was heard pre-*Goodyear*). In this case, the judge had indicated a contrasting situation which would arise on the basis of the lesser offence. It was held that was not a choice which should have been put before the appellant; the verdict was deemed unsafe and was quashed.

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<sup>80</sup> [2004] WL 852376.



What these cases have in common is that the appeals were only allowed in the two cases (*Kahn (Janghir)* and *Bargery*) in which there was incontrovertible evidence that specific offers, involving the judge had been made, which had led directly to the entering of a guilty plea. Where the facts have been more nebulous and the appeal has turned on the defendant's interpretation of what was said to them by their barrister, the courts have been reluctant to find that any pressure has been brought to bear. Most worryingly, an element of the rationale of disallowing the appeals in *Roden*, *Marshall (Leslie)* and *White* appears to have been that there was strong evidence against the defendants in those cases. This ought not, if due process values are adhered to, have any bearing on the likelihood or acceptability of a defendant having been pressurised into pleading guilty. An analysis of the case law would therefore suggest that, rather than the defendants in question having attempted to gain from changing their pleas to guilty, they were put under some pressure to do so, albeit it not in each case pressure of a degree which the Court of Appeal felt contravened the principle that a defendant's plea must be voluntary and informed.

### 3.2.3 Codes of Conduct

Codes of conduct play a pivotal role in the regulation of legal professions; they are not uniformly successful in achieving their aims but as Nicolson writes, 'they are the closest one comes to a collective statement of the ideals, values and behavioural standards to which the professions are committed' (2005, p.605). Practising barristers are regulated by the Code of Conduct for the Bar of England and Wales (2004, 8<sup>th</sup> edn.), and if prosecuting are also bound by the Code of Conduct for Crown Prosecutors (2004, 5<sup>th</sup> edn.).<sup>81</sup> The Code of Conduct for the Bar states that:

'A barrister has an overriding duty to act with independence in the interests of justice; he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court' (para. 302).

Until revised in 1998, the Code also stated that;

'Where a defendant tells his counsel that he did not commit the offence with which he

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<sup>81</sup> The Bar Standards Board launched a consultation on the content of the Code of Conduct for the Bar in March 2009, the results of which have not, at the time of writing, been published. See [www.barstandardsboard.org.uk/consultations](http://www.barstandardsboard.org.uk/consultations).

is charged but nevertheless insists on pleading guilty for reasons of his own, counsel must continue to represent him, but only after he has advised what the consequences will be and that what can be submitted in mitigation can only be on the basis that the client is guilty' (at para. 12.5 Annex H).

The most recent version now also reads that counsel 'may' continue to represent the defendant 'if he is satisfied that it is proper to do so' having explored the defendant's reasons (2004, at para. 11.5.3(a) of Section 3).

McConville (writing prior to the amendment) argued that the Code of Conduct did not serve to protect defendants from undue pressure to plead guilty because when the two provisions were combined, courts were able to accept pleas of guilty despite protestations of innocence from the defendant by manipulating the ethical concepts of responsibility and duty. He put forward the view that the requirement that a defendant must plead personally had been converted into the notion that *responsibility* for the plea was solely that of the defendant, and argued that this should not be the case, as once the facts implied by a guilty plea were out of line with private assertions of innocence to counsel, the plea could no longer be the sole responsibility of the client. By sharing knowledge, counsel shared responsibility and would become party to a deception of the court. However this, McConville argued, was circumvented by a manipulation of the ethical concept of *duty*. Where there was an inconsistent plea, and counsel was fully aware of the contradiction, under the rules of the Code of Conduct (pre-1998), it was stated that counsel 'must continue to represent' the client who maintained innocence yet wished to plead guilty. McConville argued that by elevating that professional responsibility to the client over any competing considerations of the nature of the representation, the barrister was relieved from having to reflect upon ethical considerations (1998, p.571); a criticism which, upon a careful reading of the Code, seems justified.

Although the Code of Conduct was amended in 1998 and the barrister is no longer strictly obliged to continue to represent the defendant, but may do so 'if appropriate', McConville's argument still stands. Indeed, paragraph 11.5(a) of the amended version still reads that a barrister 'must' continue to represent the defendant; the provision is clearly incompatible with 11.5.3(a) which follows. In practice, for a barrister to withdraw from a case and leave a defendant unrepresented is unlikely to happen often given such vague guidance as to when it might be the proper course of action. Furthermore, it would disadvantage both the barrister who would be left without work, and the defendant who

would be left without representation, face further delays and be forced into a position where he would be unable to tell his new barrister the truth for fear of being left once more without representation.

Some of the ethical issues which arise in this context are considered by Ashworth and Blake (1998, 2004), who highlight the fact that in most legal systems (England and Wales included) professional standards are not enshrined in legislation (1998, p.17). It is notable that the first Code of Conduct for the Bar was not published until 1980, despite the fact that solicitors have operated under a Law Society Code of Conduct since 1974 (which is still relatively late), and the Law Society Code of Conduct is over three times the length of the Bar's Code of Conduct (Nicholson and Webb 1999, p. 98). Moreover, regardless of how long the Codes of Conduct have been in existence, or how detailed they are, they are drawn up by the professions themselves and are enforced by way of self regulation (in common with most professional codes of conduct). Ashworth and Blake are critical of the self-regulation of legal professional codes and argue that as the integrity of the legal profession is fundamental to the administration of justice, which in turn is a basic constitutional function, legal professional standards ought to be capable of being legally enforced (1998, p.17).

For prosecuting advocates, the Code for Crown Prosecutors contains additional guidance:

‘Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one’ (para. 7.2, 2004), and;

‘Crown Prosecutors must never accept a guilty plea just because it is convenient’ (para. 10.1 2004).

Both sets of guidelines are vague and leave a great deal of scope for discretion. It is for example difficult to draw a distinction between a ‘convenient’ guilty plea, and one which is in the interests of justice as it saves time, money, spares witnesses an ordeal and ensures a conviction: what could be more ‘convenient’ than a plea which achieves those goals? Rosett and Cressy argued that conflicts in goals and ethical guidance are more likely to arise when those goals are expressed vaguely, and this would appear to be the case here (1976, p.127). It is of course not individual barristers who are responsible for any insufficiency in the

ethical guidance provided by the Codes; they too suffer the consequences as they are unable to perform their roles backed by the security of clear guidance as to what the ethical limits of those roles are. The only instruction pupil barristers are likely to receive on the acceptability and process of counselling defendants as to their plea, or if prosecuting, accepting guilty pleas in exchange for reductions in the severity of, or number of, charges is likely to be from observing their pupil master at work (Tague 2006, p. 24) and it is not an area which is covered during the academic stage of a barrister's training. Cape aptly describes the ethical limits of the defence lawyer's role as 'opaque' (2006, p. 56) and argues that defence lawyers are isolated in the ethical decisions they make (p. 78). The fact that the Law Society and Bar Council have set up ethics 'help lines' to which lawyers can resort if they are uncertain about the appropriate course of action in a case may be indicative of the fact that lawyers themselves find the Codes of Conduct insufficient. Nicolson has argued that one way in which codes of conduct can function to 'make lawyers moral' is by 'inculcating ethical norms both at the start of and throughout a professional's career' (2005, p.605); a function which is impossible if such norms are not clearly expressed, as is currently true of England and Wales.

The combined effect of the *Turner* rules, subsequent case law and the Codes of Conduct is therefore to allow all but the most explicit (judicial) pressure to plead guilty to take place in a legal and ethical vacuum, with little guidance available to the barrister other than the working practices of his or her peers. In a system in which there are considerable benefits to pleading guilty, it is inevitable that the advantages of a guilty plea may legitimately be part of a defence lawyer's advice to his client.<sup>82</sup> Even Alschuler, who advocated the complete abolition of plea bargaining believed that, as long as there were benefits to pleading guilty it was unfair to deny even innocent defendants the choice to do so (1975, p.1296). At present however, the form which that advice may take is not sufficiently clear, and the fine line between advice and coercion is blurred, which Alschuler argued was an inevitable consequence of a guilty plea system (1975, p.1310). It is therefore not necessarily the case that defence barristers deliberately intend to coerce clients to plead guilty, but the existence of relevant research and appeal cases suggests that it does happen; certainly there seems scant protection within the legal or ethical framework to prevent advice becoming coercive and creating a pressure to plead guilty and shows no signs of being a framework within which defendants have the capacity to play the system.

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<sup>82</sup> The recommendations of the Seabrook Committee (1992), outlined at Chapter 1.9 would suggest that the Bar has long been in support of measures which allow the advantages of a guilty plea to be made very plain to a defendant.

There are several other issues of relevance to the defence lawyer's role in cracked trials and plea bargaining though, and the remainder of this chapter considers the importance of remuneration, reputation, and the range of working relationships which may impact upon the reasons for cracked trials.

### 3.3 Remuneration

As self-employed practitioners, barristers often take on a high volume of work. This applies particularly to criminal barristers, whose earnings are significantly lower than those of their peers working in other areas of law, and many may feel the need to take on as many cases as possible to boost their income (Morison and Leith 1992, p.64). In 2005, *The Times* reported the findings of a survey of 1000 criminal barristers; 80% had said they were willing to turn down briefs – effectively go on strike without an income – if their rates of pay were not increased.<sup>83</sup> The article reported that hourly rates of pay for junior barrister were calculated at only £33.50 before tax, rising to £47 for senior barristers (excluding QCs). Nearly half of all chambers surveyed reported problems retaining barristers and 'general demoralisation'. The article quoted one barrister who had decided to leave the profession because 'it has cost me £40,000 on a professional studies loan to become a barrister. I cannot now work for nothing'. Some work, such as advising clients they have no right to appeal, is not paid at all.

Barristers have therefore traditionally tended to accept a surplus of work in the knowledge that many cases will be negotiated and not reach trial stage, which in itself provides an incentive to settle cases through negotiation and bargaining in order to manage the excess caseload (Morison and Leith 1992, p.64).

The authors of *Standing Accused* (1994) found that many barristers deliberately manipulated cases so as to not achieve a settlement until the actual day of the trial because under the legal aid rules at the time, the fee chargeable for a straightforward guilty plea was considerably less than for a case that cracked at the last minute (1994, pp.253-4). Following several years of uncertainty, the Carter Review, Lord Carter's Report on Legal Aid Procurement, was published in 1995 and the way defence barristers' fees are calculated is currently governed by the Revised Advocacy Graduated Fee Scheme (RAGFS). The

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<sup>83</sup> *The Times* June 6<sup>th</sup> 2005.

RAGFS was brought into force by the Criminal Defence Service (Funding) Order and took effect from the end of April 2007.<sup>84</sup> A criticism of the previous graduated fee scheme had been that it inadequately rewarded pre-trial preparation and made cracked trials an attractive proposition to defence barristers (Tague 2000). The current system works on the principle that a barrister is assigned a basic fee per case which is dependant on the offence, the seniority of the barrister and the type of case (mention, guilty plea, cracked trial, trial and so forth). The basic fee includes a certain number of days of trial, witnesses and pages of evidence, and barristers receive an additional fee, or 'uplift' for additional trial days, witnesses and pages of evidence; again at a rate dependant on seniority, the offence and the type of hearing.<sup>85</sup>

McConville et al.'s finding in *Standing Accused* that barristers on occasion deliberately cracked trials as it served their financial interests (1994, pp.253-254) may well still hold true despite recent changes in the fee structure. In a recent study of the impact of the introduction of fixed fees for defence lawyers in Scotland, Stephen and Garoupa have argued that if lawyers are insufficiently remunerated, they will spend less time on each case and less able lawyers will be those most likely to end up representing poor defendants; plea bargaining becomes a way of achieving the objective of taking on as many cases as possible and less able lawyers are likely to favour plea bargaining over trials (2008, p.342).

In England and Wales, the time between a case first being listed for trial and the actual date of the trial hearing is currently split into three equal time periods, and once what is known as the 'first third' has passed, the barrister is entitled to receive the cracked trial fee for that case, rather than the lower guilty plea fee. It could therefore be in barristers' interests to schedule a hearing for mention and encourage the defendant to plead guilty after this first third, but at a sufficiently early stage that little preparation has been necessary. Tague acknowledges this is a possibility although on the basis of his calculations of the relevant fees, concludes that trials rather than guilty pleas are in barristers' financial interests (2007, p.17).

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<sup>84</sup> The Criminal Defence Service (Funding) Order 2007, Statutory Instrument No. 1174.

<sup>85</sup> Ongoing disputes surrounding the RAGFS between the Bar Council, the Legal Services Commission and the Law Society remain. In November 2003 the Bar Council took the extreme step of deciding that all cases subject to the criminal graduated fee scheme were no longer deemed to be 'a proper professional fee', meaning that effectively, barristers are not obliged to take cases and the 'cab rank' rule has been suspended. In practice, barristers are self employed and need to take the work on. The Bar Council's Remuneration Committee provides up to date information on developments: <http://www.barcouncil.org/about-the-barcouncil/committees/remunerationcommittee/>

Barrister D, interviewed for this study, also indicated that he had a preference for trials:

‘It used to be the stick to beat the defence Bar with, that the Bar would always crack a trial on the day. But the thing is, if I have a trial on a Monday, that’s supposed to last for four days, and it cracks on the Monday, or even the Friday before, it is very rare these days that I’m going to pick up another trial Monday, Tuesday and another trial Wednesday, Thursday. It’s not in my interests, necessarily...to crack it late. I would crack it early enough so I could guarantee I’d have more work, otherwise I’m out of work.’

Barrister D’s motivation for not cracking trials seemed to be a desire for the certainty of work and income, and not specifically because he viewed trials to be in his financial interests. Tellingly, his statement that he would ‘crack it early enough’ suggests that it *would* be in his interests for a defendant to plead guilty if it was at a stage at which he would receive the cracked trial fee, but still be able to accept more briefs. His comment seems to indicate that he saw ‘cracking a trial’ (and thus in a sense playing the system) as something he could actively seek to achieve, rather than the decision to plead guilty being solely the defendant’s. This accords with the possibility that barristers might deliberately crack trials soon after the first third has passed. There may be little incentive for a barrister to crack a trial at this stage if he has no other briefs, but there is a considerable incentive if the barrister has another case due to be heard which he would otherwise have to return. Tague’s calculations do demonstrate that in the sets of circumstances he describes, if only strictly financial considerations are factored into the equation, trials can be in barristers’ interests (2007, pp.12 - 17). The differential, however, is dependent on the type of case, seniority of barrister, and the nature of the other briefs the barrister may have and Tague notes that his interviewees said they were not in the habit of calculating their fees in this manner (2007, p.17). If barristers are indeed generally unaware of the precise financial implications of the patterns of their caseloads this may mean that a consideration of what is in barristers’ financial interests is not as helpful as it might otherwise be, and that it is not necessarily fees *per se* which inform barristers’ preferences to crack a case or to proceed with a trial. Broader considerations regarding how they are best able to manage their caseloads in any given week may be more significant; a very late cracked trial may hold little appeal if this leaves the lawyer without work, whereas an early cracked trial or a late cracked trial where alternative work is available may prove considerably more enticing.

### 3.4 Working relationships

The working relationships between barristers and other court room actors and legal professionals have been identified by empirical studies in both the UK and the USA as a driving force behind lawyers' motivations to encourage guilty pleas and to plea bargain (see for example Blumberg 1967b; Alschuler 1968, 1975; Rosset and Cressey 1976; Baldwin and McConville 1977; Morison and Leith 1992; McConville et al. 1994). This section of Chapter 3 considers the nature of barristers' relationships with their instructing solicitors and clerks, the importance of barristers' reputations, relationships with prosecutors and judges and finally, with the defendants they represent. Blumberg's 1967 paper, 'The Practice of Law as a Confidence Game: Organisational Cooptation of a Profession' paved the way in exploring what Blumberg referred to as the defence lawyer's 'double agent' status; that is, as the defendant's representative as well as an instrument of the wider administration of justice, and the problematic dynamics of the principal – agent relationships between the lawyer, the defendant, and the other actors in the process are also considered in this part of the chapter.

#### 3.4.1 The barrister – solicitor relationship

Some cases will undoubtedly crack simply because the barrister, upon receiving the brief from the solicitor, may legitimately take a different view of the strength of the case, and therefore rightly advise of the benefits of a plea of guilty, and the defendant will enter a plea of guilty, in the knowledge that was the right decision. Barristers are generally considered to be specialists, more expert in the law than solicitors, and on the day of trial have a greater knowledge of the strength of the prosecution and defence cases and of the judge's reputation for giving, (for example) custodial sentences, or sentence discounts, or the judge's views on particular types of evidence or offence (Morison and Leith 1992; Nicholson and Webb 1999; Abel 2003, Tague 2006). Additionally, as one barrister interviewed by Morison and Leith stated:

'Because we come from outside we can tell them things that their solicitors, who...don't want to upset them and so forth...and are perhaps more involved, can't tell them.' (1992, p. 68).

Counsel will often be in possession of more accurate facts and it may be that full disclosure has not taken place until shortly before the trial. Moreover, the attendance and reliability or



otherwise of prosecution witnesses also form part of the ‘facts’ which determine the strength of the case against the defendant. It has been argued that there is a need for defence solicitors to be more proactive in seeking out relevant evidence in their clients’ cases (Edwards 2008, p.248) and if solicitors are indeed unwilling or unable to obtain material, then this undoubtedly exacerbates the problem of significant information only coming to light at a late stage in the case preparation.

In the present study, three interviewees identified late developments in cases as a key factor in cracked trials:

Barrister A: ‘The main issue is that you don’t have all the evidence until a late stage and don’t know if witnesses will turn up. These are factors which only come into play at a late stage, and if they do, they’ll result in a cracked trial.’

Barrister B: ‘When you first get the brief and have a conference with the client, the case can look very very different than at the [Plea and Case Management Hearing], then very very different again by the date of the trial.’

Judge A: ‘...the full living dynamics of a case only come to light in the corridor as it’s just about to start.’

Provided that counsel in such situations does not place any undue pressure on defendants to plead guilty, is simply in possession of more accurate facts than the solicitor, and it is this alone which leads a guilty defendant to make a rational choice to plead guilty, there is little cause for concern.

There are however other aspects of the barrister – solicitor dynamic which may operate against the defendant’s interests. The Code of Conduct for the Bar states that:

‘A barrister owes his primary duty as between the lay client and any professional client or other intermediary to the lay client and must not permit the intermediary to limit his discretion as to how the interests of the lay client can best be served’ (2004, para. 303(b)).

It is, however, the professional client, the solicitor, who is strictly speaking the barrister’s

'client', and not the defendant.<sup>86</sup> Barristers receive briefs from solicitors, and are almost wholly reliant on solicitors for their work.<sup>87</sup> However, the extent to which solicitors are involved in the case once the brief has been passed to counsel is limited, and barristers will generally conduct pre-trial conferences with the defendant without the solicitor present. Attending conferences is an inefficient use of a solicitors' time financially, and as they have passed the brief to the barrister for the barrister's expertise, from a purely functional point of view, there is little reason for their attendance. Often a clerk from the solicitor's firm will attend to take notes at the conference but clerks are generally not legally qualified and play little role, if any, in the outcome of the conference. McConville et al. write that '[T]he end result of these work practices is to establish barristers as the dominant, sometimes, sole actors in critical dealings with defendants' (1994, p.244). The solicitor's views on the case may therefore be ignored despite the fact that he may have spent longer with the defendant and / or possess a more detailed knowledge of the facts and the circumstances of the offence.<sup>88</sup>

Barristers are not the dominant actor in all aspects of the barrister – solicitor relationship though; they are reliant on solicitors for future briefs and must carry out their instructions to the satisfaction of the solicitor. Tague argues that this has the consequence that barristers are inclined towards taking cases to trial in order to impress solicitors with their ability to win cases, and thus do not have the motive to plea bargain, as is commonly asserted by other commentators. He argues that the solicitor's priority in selecting a barrister is the barrister's ability as an advocate, not as someone who can negotiate an outcome, and states that 'solicitors commonly do not want the barrister to dampen the defendant's enthusiasm for trial' (Tague 2007, p.6). This is at odds with the findings of other studies, *Standing Accused* (1994) in particular. It is of course possible, and perhaps even likely, that working practices and attitudes have changed in the thirteen years between the two publications. This may well be a factor, but is unlikely to account for quite such a vast difference in perspective. An additional consideration in reconciling the two studies may be that Tague's findings are coloured by his methods; interviews with barristers who may have

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<sup>86</sup> Chapter 3 of Morison and Leith (1992) provides a detailed analysis of the structure of the client relationship.

<sup>87</sup> Although barristers can now also be instructed by some professionals such as accountants and surveyors under the Licensed Access Scheme. See [www.barcouncil.org](http://www.barcouncil.org)

<sup>88</sup> This is of course subject to McConville et al.'s findings that defence solicitors appear to be no more likely to display adversarial values than barristers, and that they also come to view a guilty plea as the standard case outcome (1994, p.252). There may, however, be cases in which the solicitor feels a trial would provide the defendant with a good chance of acquittal, only for the barrister to encourage the defendant to plead guilty.

had a vested interest in putting across a particular impression of their working practices. *Standing Accused*, by contrast, was a wide ranging observational study and therefore achieved a broader perspective. Furthermore, Tague does not consider the importance of occupational cultures which could lead to both solicitors and barristers viewing a guilty plea as the 'standard' outcome.<sup>89</sup>

One final aspect of the solicitor – barrister relationship of relevance here is the increasing commercialisation of the Bar and the introduction of solicitor advocates. Relatively few solicitors have sought higher rights of audience, but there is some suggestion that those who have, have had an impact on the work of the junior Bar (Jackson and Hanlon 1999). It is more cost-effective for solicitors' firms to use their own in-house advocates where available than to instruct counsel, and Hanlon and Jackson argued that this could force the Bar to change some of its working practices in order to provide a better service to solicitors and ensure that they maintained a healthy workload (1999, p. 576). One aspect of this would no doubt be a greater emphasis on continuity of representation (discussed further at 3.4.5 below), which the 2007 RAGFS and the Bar Council now hold out as a key aim, and fewer returned briefs, perhaps combined with a greater willingness to conduct conferences in advance of trial. These would be changes which would benefit defendants as well as solicitors. It is after all the defendant who is the solicitor's client, so in an increasingly market driven legal profession, solicitors have a vested interest in instructing barristers who will keep their lay clients happy.

### 3.4.2 The barrister's clerk

The barrister's clerk plays a vital role in the running of chambers; clerks manage their barristers' briefs and communicate with solicitors on behalf of barristers, and therefore play a pivotal role in a barrister's caseload. Flood (1983), in an (albeit outdated) ethnography of barrister's clerks cites Zander's view that 'the clerk exercises an influence over the distribution of work amongst his supposed principals which is out of all proportion to his qualifications or other attainments' (Zander 1968, pp. 85-86, cited at p. 37). Of significance to cracked trials and plea bargaining is the fact that clerks retain a percentage of each fee earned by their barristers, so have an interest in keeping the case within chambers, and will often keep a brief despite knowing that the barrister instructed is already committed to appear elsewhere. This enables them to inform the instructing solicitor at the last minute, at

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<sup>89</sup> It may be that the London bar, where Tague carried out his interviews, is more inclined towards adversarialism. See section 3.4.3 below.

which point the solicitor is likely to settle for another barrister from the same set of chambers clerked for by the clerk in question, allowing him to retain the fee.

### 3.4.3 Reputation

The potential impact on a barrister's reputation of an embarrassing trial performance has been put forward as a plausible explanation as to why some barristers may pressurize their lay clients to plead guilty if the case appears weak or if the barrister is insufficiently prepared (Belloni and Hodgson 2000, p. 156). Tague describes these claims as 'unlikely' and states that 'advocates must learn how to argue hopeless cases' (2007, p.7). Tague argues that a reputation for advocacy is more important than a reputation for negotiation or extracting guilty pleas from defendants (2007, p. 5) and that it is therefore in barristers' interests to take a case to trial, and that even ill-prepared, counsel could 'resort to formulaic questioning and arguments that would be sufficient to hide a lack of exhaustive knowledge of the brief's finer points' (2007 p. 7). Tague also argues that unlike Baldwin and McConville's barristers in 1970s Birmingham, his sample of London barristers believed that they would be sanctioned by instructing solicitors by being denied briefs in the future if they were found to be inducing guilty pleas in order to dispose of a case, particularly if this was done to avoid returning another brief from a rival solicitors' firm (2007, p.9).

Barrister D, when interviewed for this study, made reference to his belief that it would reflect badly upon him if he were seen to be extracting guilty pleas:

'It's not in your interests to make them [plead guilty], because then it just bites back on you...that just makes me look like a dufus, so I'm not prepared to do that.'

Despite Tague's arguments, it is submitted that the importance of reputation, and how that reputation is judged, can have a range of varying impacts on barrister's attitudes to cracked trials. Barrister B was introduced to me by a barrister from his chambers as someone with a reputation for cracking trials, and Judge A had also mentioned Barrister B's name to me as someone who often cracked trials; I did not get any sense that these were intended to be disparaging comments, they were good-humoured, and it was simply the way Barrister B was perceived to carry out his practice. Barrister B was one of the more frequently instructed barristers in the sample of Crown Prosecution Service files, and was regularly instructed by both defence and prosecution; a reputation for cracking trials had evidently not harmed his career. Those interviewed frequently referred to trials cracking as trials

being ‘dealt with’, or ‘sorted out’ and made references to cracked trials being neither particularly good nor particularly bad:

Barrister B: ‘Cracked trials are neither a good thing nor a bad thing, they’re just a fact of life.’

Barrister D: ‘Cracked trials? What can you do? Maybe they’re just part of life’s rich tapestry.’

Barrister D also felt that there were some types of cases he would rather see cracked:

‘There are cases you’d like them to sort out [crack], particularly those with child witnesses...’

The different conclusions drawn by Tague could plausibly be the result of differences between the London Bar and the regional circuits, as Tague himself recognizes (2006, pp.24 – 25). London has historically had a much lower cracked trial rate than the circuits (Zander and Henderson 1993) and barristers working on a circuit where cracked trials are the norm are likely to have a different perspective on them to those working in London where they represent a far smaller proportion of cases. Tague’s 2007 paper also refers to the fact that cracked trial rates are considerably higher outside London.<sup>90</sup> This may suggest that the London barristers interviewed by Tague were less inclined to encourage their criminal clients to plead guilty than those on the circuits. Several of the barristers Tague spoke to believed that counsel on other circuits ‘continued to overbear reluctant defendants to plead guilty’, which they felt to be true because they had on occasion been briefed to appear in courts elsewhere, instructed by solicitors who were fearful that local barristers would pressurise their clients to plead guilty (Tague 2007, n.10). Sommerlad, in a study of solicitors, also found that London barristers had a better reputation for adversarialism (2001, p.347). Cracking a trial is likely to have a different impact (or none at all) on the career of a barrister whose peers are involved in cracked trials on an equally regular basis.

It may also be that, whereas being seen by solicitors to pressurize defendants into pleading

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<sup>90</sup> The cracked trial rate at the Inner London Sessions House was 29.2% in 2006/2007, compared with a national average of 39%, and between 2002/2003 and 2006/2007 has ranged from 25.2% to 29.2% (Crown Court Annual Reports, 2006/2007).

guilty can harm a barrister's reputation, the effect will vary depending on the type of case, the style of representation the barrister wishes to be known for, and the solicitor's opinions on the defendant's guilt. If the solicitor feels there is strong evidence against the defendant, and / or has formed the opinion that the defendant is guilty, then he is unlikely to express surprise at a cracked trial or suspect the barrister of bullying the defendant into changing his plea. The impact of individual, local and regional working practices can therefore not be underestimated when considering reputation and its effect on barristers' advice to defendants on plea, and barristers' own interests in case outcomes. The evidence on whether reputation is a factor which may lead to barristers having an interest in defendants pleading guilty is sparse, but it seems that local factors may have a bearing on whether or not guilty pleas align with barristers' interests and may play a role in the presence, or nature, of any pressures placed upon defendants to plead guilty.

#### 3.4.4 Relationships with prosecutors and judges

Boon and Levin have written that 'nowhere is the notion of legal culture stronger than at the English bar' (1999, p.69). The close physical proximity of barristers' chambers, particularly on the regional circuits, and the relatively small size of the profession is regarded as a key factor in the Bar's ability to perpetuate its working practices. In the light of Tague's findings discussed above, it is noteworthy that as it is considerably larger, the London Bar is more geographically dispersed and barristers will often be briefed to appear in courts some considerable distance from central London. Nonetheless, the Bar is a tightly knit community; even in London barristers will often know each other (on the regional circuits it would be unusual for them not to) and barristers are bound together not only by their affiliation to a set of chambers, or of a regional circuit, but also by membership of one of four Inns of Court.

The 'cab rank' rule, which dictates that barristers must not refuse cases within their competence, ensures that barristers will sometimes defend and sometimes prosecute cases. (Although in practice barristers are able to become 'typecast' as prosecutors or defenders, should they wish to be, often with the aid of their clerk who can make it known what kind of briefs 'their' barrister is looking to take on (Morison and Leith 1992). The close community of the Bar could have the effect of jeopardizing defendants' interests in situations where barristers who may face each other repeatedly have a greater vested interest in keeping each other happy than they do the interests of a defendant they may have only met that morning, and will perhaps never see again. Barristers serving each

others' interests (and those of the judges they appear before), may manifest itself in plea bargaining and the resulting bargains are as much between the opposing counsel as they are between the defendant and the state. As one defendant in Baldwin and McConville's study said of his barrister's apparently close relationship with the prosecuting counsel:

'[A]fter all, they're near enough mates in the same play. They're the cast of the play, you're just the casual one day actor. It's just another day's work to them.' (1977, p.85).

Another commented that:

'...they all basically piss in the same pot.' (1977, p.85).

Of the US context, Luban has written that 'as a repeat player in the criminal justice system, the defense lawyer has an interest in playing ball with the prosecution' (1988, p. 60). This may be more true of the US system, where the prosecutor still has greater power and influence to make binding deals with the defence, but as Baldwin and McConville's interviewees suggest, the same was true at least of some defendants' perceptions of the English criminal justice system (Baldwin and McConville 1977, pp.83 – 100). Tague presents a contrasting finding; his interviewees stated that they would resist the temptation to put the interests of working relationships with colleagues above those of the defendant if their opposing counsel was a member of the same chambers (2007, p. 6). This only takes into account that specific scenario though, and Tague provides no analysis of the importance to his interviewees of maintaining good working relationships with other members of the Bar, and with the judiciary more generally, save to say that the view that it affects barristers' representation of defendants 'is wholly inaccurate as a description of barristers' motives' (2007, p. 11).

My own data support the view that good working relationships between defending and prosecuting counsel are important, and they were referred to by interviewees as a significant consideration. Court Administrator B felt that negotiations between prosecuting and defending counsel were a key cause of trials cracking, and lawyers themselves suggested that cooperation between opposing counsel and between barristers and judges was important, and played a role in trials cracking. Barrister A described the process of negotiating pre-*Goodyear*, (in other words, illegal) sentence indications thus:

‘We’ve always had *Goodyear* indications, it’s just they weren’t called that. It was a case of round the back and, ‘how’s about it Judge?’”

Barrister D also described *Goodyear* indications as a form of cooperation between the judge and defence counsel:

‘You tend to find *Goodyears* are used as a lever, perhaps to crack a trial when really daggers are drawn and you say ‘this is our last chance’ to the judge, ‘can you throw us a bone, if you say it’s less than twelve months [the defendant will plead guilty]’ type of thing.’

This is a particularly interesting comment as it implies that defence barristers in the situations Barrister D describes are ‘leaning on’ defendants, evidently have some interest in persuading the defendant to plead guilty, and use the judicial *Goodyear* indication as a ‘lever’ to achieve that outcome; in full cognisance of the judge. (This assumes that Barrister D’s account is accurate in suggesting this is not a rare occurrence). This appears to be a clear example of a cracked trial occurring as a result of pressures to plead guilty, originating from the judge and the defence barrister, being brought to bear upon a defendant.

Of the relationship between prosecution and defence, Solicitor A commented:

‘...if there’s a dialogue to be had [regarding the charge], and both parties are prepared to engage in this dialogue there’s always scope in there, whatever the charge.’

These comments add to the bank of evidence that legal professionals’ working practices take place within organisational structures of the criminal justice system in which the actors within that structure value each others’ interests; interests which may have the potential to override those of the defendant. There is a considerable body of literature which considers a range of approaches to, and explanations for, organisational working practices within the legal profession, the criminal justice system and organisations more generally. Writing specifically of the organisational conditions which lead to the prevalence of plea bargaining in the United States, Feeley argued that the desire for cooperation transcended the need to juggle busy caseloads:

‘Clearly it is more than a problem of overcoming work-load so that good men can



do good work. 'There exist strong competing norms and incentives which act at cross-purposes to the system's formal goals and norms.' (1973, p.422).

In England, this was illustrated by *Standing Accused* (1994) which highlighted a range of factors within the solicitors' practices observed which went far beyond the practicalities of maintaining a busy practice to tight deadlines. The researchers found that clients were regarded as 'good' if they accepted advice compliantly and ideally entered guilty pleas without complaining. 'Bad' clients resisted advice, requested meetings with counsel in advance of trial, and objected to discontinuous representation. McConville et al. also presented the finding that clerks seemed to learn that criminal clients were not worthy of a great deal of respect and during the course of their employment began see criminal practice as being geared towards the production of guilty pleas. It was argued that qualified lawyers often did not check whether there was a factual basis for a plea of guilty and that their desire to secure guilty pleas meant that they would sometimes accept a plea even if this was completely at odds with what the rest of the client was saying (1994, pp. 189 - 193). This appeared to have occurred in Case 2 of the CPS file sample, in which the defendant pleaded guilty to reckless arson, despite putting forward an alternative version of events and maintaining his innocence of the offence charged. There was no basis of plea and no evidence (at least not recorded on file) that the defendant's barrister or the judge had ensured the plea was consistent with the version of events the defendant was putting forward.

In order to consider the reasons why such organisational practices might arise, it is possible to draw on the literature on the sociology of institutions and professions and to apply this directly to the legal profession, and where possible to plea bargaining specifically. Organizational theorists draw upon studies of behaviour in commercial enterprises and large public institutions and view the criminal justice system in terms of the structure of roles and relationships among workers in the courtroom setting (Schulhofer 1984, p. 1041). Feeley describes a system of administration of justice as entailing the key elements of an organisation: institutionalized interaction of a large number of actors whose roles are highly defined and who share a responsibility in a common goal – that of processing arrests (1973, p.407). The idea that the criminal justice system, and the courtroom as a microcosm of that system, can be regarded as an organisation and can be evaluated on organisational terms does not require a great conceptual leap, but defining what type of organisation the criminal justice system represents does create some difficulties. Even the starting point is contentious; although Feeley argues that the actors within the system share the common

goal of processing arrests, others would disagree, and there are a vast range of perspectives on what the goals of the criminal justice system are, or should be (see for example Ashworth and Redmayne 2005; Sanders and Young 2007; Padfield 2008). It is beyond the scope of this thesis to do justice to the vast body of literature on organisational theories, or to put forward an organisational model with which to explain lawyers' working practices with regard to plea bargains or cracked trials and the intention is simply to highlight the key explanations which have been put forward.

Blumberg's research was one of the first studies to address the issue; he argued that the criminal justice system was a hierarchical structure and that the defence lawyer acted as 'double agent' who performed a mission for both the accused and the court organization, and therefore had a vested interest in limiting the scope and duration of the case to make it more profitable for the court organisation (1967b, p.28). Skolnick, however, put forward the view that the main cause for deviance from adversarial, conflict norms was not so much double agency as simple administrative convenience (1967, p.55). He argued that most prosecuting and defence attorneys were young, inexperienced and idealistic lawyers who became socialised into the organisational structure through a system of informal controls which valued a plea of guilty above all, and achieving a guilty plea became the interest which all parties shared. Skolnick argued convincingly that lawyers rationalized this behaviour by placing great value on administrative efficiency and by the belief that they were serving the interests of the accused in securing a reduced sentence.

Feeley was critical of the rigidity of the Skolnick-type model and put forward an alternative, functional systems approach as a more realistic means of evaluating the organisational structure of the criminal justice system. He argued that such an approach embodied a 'far greater and explicit concern for 'explaining' the behaviour of the actors (as opposed to simply 'contrasting' it [with what rules dictate the behaviour 'ought' to be])' 1973, p.419'. Feeley's approach views the organization of the administration of criminal justice as a system based primarily upon cooperation, exchange and adaptation, and emphasizes these factors over adherence to formal rules and defined 'roles':

'The 'rules' the organization members are likely to follow are the 'folkways' or informal 'rules of the game' within the organization; the goals they pursue are likely to be personal or sub-group goals; and the roles they assume are likely to be defined by the functional adaptation of these two factors...the functional-systems approach is likely to begin to identify and examine the adaptation of the actors to

the environment, the workload and the interests of the persons placed within the system, i.e. other goals of the actors within the organization' (p.413).

The functional systems approach, outlined here in brief, has potential to be valuable in exploring, and perhaps explaining, the relationship between lawyers' working practices and plea bargaining, but it is important to note that the theories are presented as an analysis of the US criminal justice system. Further research on the organisational structure and working practices of the English criminal justice system is needed in order to apply and adapt the theoretical perspectives. One comparative issue to be investigated by future research would be whether the fact that, in England and Wales, the concept of plea bargaining is less recognised, and is seen as deviating more considerably from the ideals of the adversarial system, may have the effect that it takes greater organisational and cultural pressures to engender a situation whereby defence lawyers actively encourage guilty pleas than it would in a jurisdiction in which plea bargains are more openly acknowledged and regulated.

Nonetheless, the evidence currently available from previous research, as well as from the present study, does suggest that the nature of their relationships with prosecutors and judges may lead defence barristers to have an interest in encouraging or placing pressure on their clients to plead guilty. Tague's findings stand out as an exception; this may be due to his research having been carried out in London which, if this is the case, would demonstrate the importance of local working practices.

#### 3.4.5 Relationships with clients

One issue which is likely to impact significantly on a defendant's relationship with his barrister, and the quality of his representation, is whether the defendant has been represented by the same barrister throughout. Continuity of representation from an initial conference with the client to the pre-trial hearing and beyond firstly allows the barrister and client to develop a rapport, but also ensures that the barrister briefed for the trial is in possession of the full facts of the case, has had adequate time to prepare, and has spoken to the defendant prior to the trial. This was, however, often not the case within the sample analyzed for this study, and the level of discontinuous representation faced by defendants was a striking feature of the data collected from CPS files; it was not uncommon for a defendant to be represented by a different barrister at each hearing. Only 66 defendants (45%) in this study's sample were represented by the same barrister for each of their court

appearances (see Fig. 3.1 below). It is an inevitable result of barristers taking on large caseloads, or barristers' clerks not advising solicitors soon enough that the barrister requested will be unavailable, that some briefs will be returned at the last minute. The barrister who is ultimately briefed to take the case may arrive at court ill-prepared to take on a trial, through no fault or incompetence of his own. Zander and Henderson found that a third of defence barristers said that they did not receive the brief until either the day before the hearing or on the day itself (1993, p.32) and in such circumstances, conferences with clients can be nothing other than last minute hurried affairs carried out at the court. Bottoms and McClean found that of those committed for trial and pleading guilty, 96% had not seen their barrister until the morning of the hearing. Even of those pleading not guilty, 79% did not meet their barrister until the morning of the hearing (1976, p.158), which suggests that those defendants who did not meet their barristers until the day of the trial were those most likely to plead guilty. It should come as no surprise that in Baldwin and McConville's research, the barristers most seriously criticised by defendants tended to be those with the largest caseloads (1977, p.45). A related issue is highlighted by Sommerlad and Wall's (1999) research; they argue that a lack of pre-trial contact between lawyers (in this case, solicitors) and their clients leads to poor rapport, which in turn makes it more difficult to elicit relevant information from the defendant. The same principle undoubtedly applies to barristers and defendants who do not meet in a pre-trial conference, and makes it all the more unlikely that the barrister is able to go beyond the papers in front of him and listen to 'the story the defendant has to tell' (Cownie et al. 2007, p. 320). Since many of the findings mentioned above, there have been developments in disclosure and court listings procedures which should, in theory, mean that barristers receiving briefs at such a late stage and being expected to try a case the following day should be a thing of the past.<sup>91</sup> Nonetheless, the problem appears to persist. Furthermore, although it dealt with prosecuting rather than defending counsel, the National Audit Commission's 2000 report on the Crown Prosecution Service reported on Crown Prosecution Service branches where returned briefs were known to be a problem, and found that in these branches, 75% of all briefs were returned and that in one third of these cases counsel eventually appointed was

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<sup>91</sup> The Criminal Procedure and Investigation Act 1996 introduced a framework of disclosure, including of unused material, between the prosecution and the defence. In 2006, the use of XHIBIT, an online court hearing information system which provides updated information on the progress of hearings, was rolled out nationwide, although its implementation at Minshull Street has been described as 'extremely challenging' (Crown Court Annual Reports, 2006/2007, Manchester Minshull Street, p.4). In 2006 Manchester Minshull Street Crown court also began a pilot of PROGRESS, an electronic case progression system, accessible by courts, the CPS and defence solicitors, and since early 2009 is gradually being rolled out to other areas.

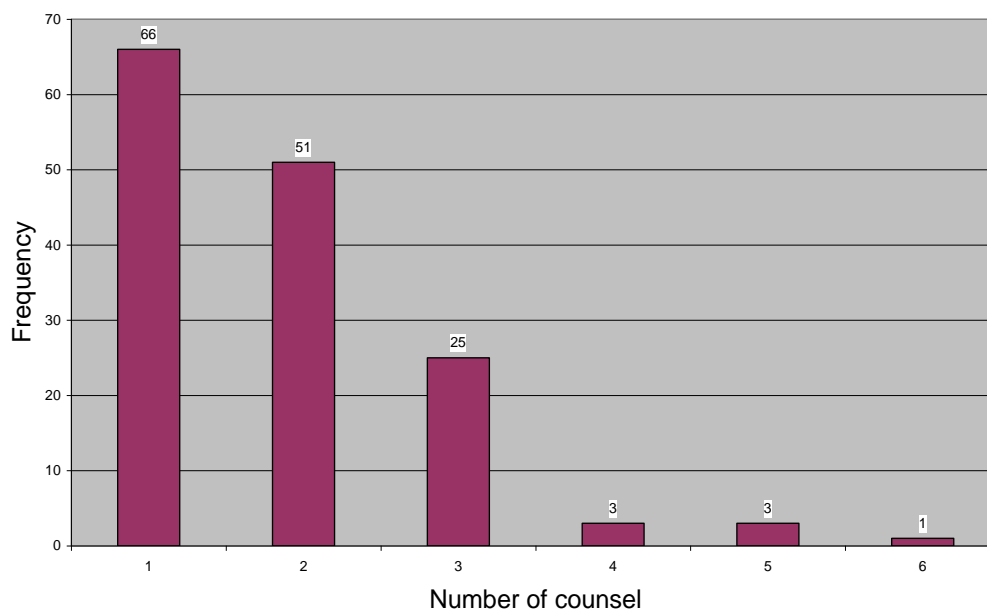
judged to have been of inappropriate quality.

From a barrister's perspective, aside from the inconvenience of short notice case preparation, another problem is that if he was not the barrister originally briefed, he is unable to claim a fee for the appearance directly under the Graduated Fee Payment Protocol (para. 14), and must instead rely on the advocate initially instructed to apportion the fee appropriately. Moreover, if the barrister has not been able to gain a sufficient grasp of the facts of the case, he risks a poor performance in court unless the client pleads guilty. It should be noted that since Plea and Directions Hearings were introduced to all Crown Court cases in 1995, it will be very rare that a defendant will not have met *a* barrister prior to his trial date; the issue is that this will often not be the same barrister as is ultimately briefed to represent the defendant at trial.

There seems to have been little success in reducing the incidence of discontinuous representation, despite the fact that the importance of the continuity of representation was stressed by the Carter Review (at Chapter 2, para. 170) and that the Graduated Fee Payment Protocol issued by the General Council of the Bar in 2007 states (at para. 9) that the Bar is taking the lead in addressing the problem of discontinuous representation, there remains much progress to be made. It should, however, be stressed that the results of this study suggest that discontinuous representation did not appear to be a particular feature of cracked cases in the sample (see Chapter 3.4.5) - which is not necessarily to say that it did not impact on the quality of legal representation.

As Fig. 3.1 below shows, in 83 cases (55% of the total sample) individual defendants were represented by more than one barrister during the course of their court hearings and in 32 cases (21.3%), defendants were represented by three or more barristers. It should be noted that none of the sample of cases were cases in which both a leading and junior counsel were briefed to appear on behalf of the same defendant; all occurrences of multiple representation were of discontinuous representation.

Fig. 3.1 Number of counsel



Discontinuity of legal representation would in all likelihood prove to be a hindrance to any defendant attempting to play the system and plead tactically as it would create a lack of certainty and continuity in the case preparation, thus reducing the potential for tactical manoeuvring, with or without the aid of the barrister(s) briefed.

In addition to discontinuous representation, there are a range of other factors which have a bearing on barristers' relationships with defendants, as evidenced by empirical findings from both the present study and previous research. Bottoms and McClean wrote that 'many members of the Bar would argue strongly that it is no part of their duty to get to know the defendant' (1976, p.158). If this still holds true, the impact this element of the legal profession's culture has on the representation received by criminal defendants is potentially considerable. More recently, McConville gave a damning critique of defence lawyers' commitment to their clients' best interests:

'Defence lawyers approach their work on the basis of standardised case theories and stereotypes of the kind of people who become involved in criminal events; images of clients as feckless and dishonest are allowed to structure the way their cases are handled from the outset; the views of clients are given little weight and their accounts not investigated; and the case proceeds on the basis that the lawyer knows best in a context in which all the incentives point towards a guilty plea' (1998, p. 572).

A similarly dismissive attitude towards defendants is supported by this study's findings and was a notable feature of several interviews, as the sections extracted below demonstrate:

Barrister C: 'We [criminal barristers] deal with flawed individuals...'

Barrister D: 'There's only two types of defendants. One's the new guys, who, if you tell them to plead guilty, they will, [this was followed by a long pause and a glance at the voice recorder]... but you, you obviously, can't do that. And then there's the guys who've been around the system, who already know all about the discount, and you can say to them, well, let's sort out a deal.'

Judge A: '...I'm afraid, and this is not being class-ist, you've just got to be sympathetic with people who live in high rise blocks. What have they got to look forward to? Take Joe Bloggs in this burglary trial I'm doing: if he isn't picking up a woman and having it off with her, or scoring with drugs or going for a boozy night out.... They're on benefits, what have they got to look forward to?'

Judge B: 'Whereas you or I might think, ok, I really ought to face up to this...the criminal's thoughts are somewhere else entirely, they're thinking about their girlfriend, or that they don't want to have to admit it to their mother...'

Solicitor A: '...there's always those [defendants] who'll chance their arm as long as they can, is my experience...[it] depends on the psyche of the client, what he wants out of it....Defendants are people who tend to do what they want.'

Judge A commented that the defendants he sentenced were not be influenced by inducements to plead guilty early because of their 'chaotic' lifestyles which made them 'put off everything to the last minute'. He felt that it was:

[a]ctually a problem of delayed gratification, and you can't blame people who perceive they're an underclass and don't have anything to look forward to in life, for putting off things and taking pleasure and gratification where they can....I can delay having the next boozy night out or pursuing the next girlfriend because there are other long term rewards in my life...[but] what

have they got to look forward to?’

Judge B felt that ‘the criminal has an entirely different agenda’ and ‘everything in life is a gamble for them’.

As these comments illustrate, the perception of the defendant as not necessarily dishonest, but as hapless, disorganised, and ultimately guilty, appeared to feature in the minds of some of those interviewed. Galligan has argued that an important constraint on the exercise of official discretion is the official’s moral attitude and that there is a ‘close and complex relationship’ between that and his actions (1990, p. 139). If attitudes are that defendants are inept and incapable of making rational decisions themselves, it is likely that legal professionals will seek to impose their own conceptions of the best outcome upon defendants. Two cases in particular within the sample of CPS case files also appeared to fit with McConville’s characterisation of cases ‘proceed[ing] on the basis that the lawyer knows best...’ (1998, p. 572).<sup>92</sup>

In Case 41, the defendant had been charged with attempted kidnap and was intending to maintain a not guilty plea. His barrister had approached the prosecution and asked if a guilty plea to s.4A of the Public Order Act 1986 (causing intentional harassment, alarm or distress) would be acceptable; the prosecution refused, but indicated that a guilty plea to s.4 of the Protection from Harassment Act 1997 (putting people in fear of violence) would be acceptable. Counsel put this indication to the defendant, who subsequently pleaded guilty. The defendant later applied to vacate his plea, claiming that he had felt pressurised into pleading guilty, although at a later hearing retracted his application and the guilty plea stood. The file contained a witness statement, written by the barrister originally instructed, justifying her advice to the defendant:

‘I had no instructions from the defendant that he would plead to such an offence, but it occurred to me that, had it been acceptable, it would meet the merits of the case and in effect guarantee that the defendant would not receive a custodial sentence. It was my intention to offer it as an alternative to the defendant for him to consider.’

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<sup>92</sup> The fact that only two such cases were identified does not necessarily suggest this is a rare occurrence; but rather that it is not an approach which is likely to be recorded on file with any frequency, let alone on a prosecution file.



The defendant's barrister appears to have assumed that the defendant would be amenable to a guilty plea (and was therefore perhaps guilty), and sought to make an agreement with the prosecution without first consulting the defendant, thus demonstrating an indifferent approach to the defendant's wishes. A similar attitude was displayed in Case 18, in which the defendant had been charged with the rape of a 15 year old girl. On the second day of the trial, the prosecution indicated that a plea of guilty to unlawful sexual intercourse would be acceptable, but the defendant refused to plead guilty. The case file contains the comment: 'He will not take the plea!!!'. This seems to express surprise and / or frustration at the defendant's decision not to accept what was perceived to be a good 'deal' (which was of course only a good deal if the defendant was legally guilty). The defendant's decision served him well as he was later acquitted.

The above comments and cases notwithstanding, there were occasions on which it seemed that interviewees' perceptions of defendants' cases were slightly less glib, such as Barrister D's comment below:

'I've had people where you've said, look, this is an overwhelming case, I can be as blunt as that, and they go I know it is, but I didn't do it. They're just as entitled to be defended to the best of your ability as those who've got a really weak case against them but equally, there's a twinkle in their eye and you know full well they did it.'

Barrister A, whilst stating that it was ultimately defendants who caused trials to crack, also said that:

'I can defend the punter because I think the system's a bit unfair...It's stacked up against the punter.'

It is possible that as the legal profession is increasingly market-driven, and defendants have become consumers, that word of mouth is important, and repeat offenders are likely to use the same firm and request the same solicitor or even ask that a particular barrister be briefed. Coupled with this, there is a growing awareness of ethical practice and a (perhaps exaggerated) fear of complaints; the consequence being that, irrespective of defendants' due process rights, barristers cannot afford, financially or professionally, to act with impunity. The comments made by those interviewed for this study suggest not that barristers are necessarily committed to defendants' due process rights, but rather that they

have become wary of deviating from adversarial principles too visibly. As Barrister D stated:

‘The ones that are going to spin it out, spin it out, and there’s precious little pressure that can be brought to bear to speed that process up. And you always run the risk that it is pressure, and they’re going to turn round and say, ‘you made me’, or ‘you did this’ or ‘you did that’, and that’s not in my interests to do that anymore.’

Barrister D’s comments suggest he would like to be able to ‘speed the process up’ and that it was not in his interests to put any pressure on defendants *anymore*. Tague also found that his interviewees were wary of being fired by the defendant, denied briefs by the solicitor or being sanctioned by the Bar Council (2007, p.9) and writes that ‘one barrister said she was ‘petrified’ of being accused of pressurising guilty pleas’ (2007, p. 10). Alschuler also found this to be an issue in his much earlier research in the United States and argued that defence attorneys were aware of the need for self protection in giving their advice and sought to avoid accusations of coercing innocent people to plead guilty (1975, p. 1283). Similarly, one barrister interviewed as part of the *Standing Accused* study stated that ‘If you get too tough at the start, they sack you!’ (McConville et al. 1994, p. 253). The context into which McConville et al. placed that comment was that the researchers found that encouraging defendants to plead guilty at a pre-trial stage was at first a subtle process, rather than explicit pressure. Tague would perhaps disagree that any encouragement at all to plead guilty is routine, but it does demonstrate that an awareness of the need to tread carefully lest the defendant or solicitor sacks the barrister appears to be a common consideration for barristers advising on plea.

Tague places weight on the fact that, whilst acknowledging that defendants do make complaints about barristers’ behaviour in inducing guilty pleas, ‘the Bar’s administrator of ethics matters could recall no instance when a barrister was found to have acted improperly’ (2007, p.10). The wisdom of relying on this recollection at face value is debatable, but more importantly Tague fails to acknowledge the potential significance of the fact that what defendants may consider to be pressure, the Bar does not. Undoubtedly some defendants may be overly ready to complain about their representation, but if the Bar perceives advice as ethical which defendants perceive to be pressure, then there is at the very least some need for clarification.

Some researchers have argued that the outward appearance of lawyers’ working practices

could actually mask a more due process orientated relationship with their clients. Emmelman (1996, 1997) argues that (at least in the US context), defence lawyers do in fact make a series of decisions during plea negotiations which are guided at least in part by due process values and that they do not settle for bargains which are unfavourable to their clients (1996, p.357). She found that, where the prosecution made an offer which was not better than average, defence lawyers attempted to elicit a more favourable bargain, and that they did so by asserting information about the facts of the case and the evidence which led to a higher valuation of the case. Emmelman claims that as a result, 'plea bargaining and trial can actually be seen to converge' because the same facts and evidence are being used to achieve the eventual outcome, and their strengths are assessed in the same way they would be at trial. In addition, she points out that some trial hearings will often have taken place before the case is settled, so there will have been some conventionally adversarial assessment of the strength of the case (1996, p. 357). It is unlikely that evidence presented in support of a plea bargain could be challenged and assessed in as great a depth as it could at a trial, but Emmelman's research does provide some tentative evidence that defence lawyers may be more responsive to defendants' rights and the strength of the case than most accounts suggest, but that the process is an 'elusive [and] unspoken' routine, which is therefore overlooked (1997, p.952). This relates to the school of thought that plea bargains are concluded in 'the shadow of the trial' and that the final outcome is in any case determined with implicit reference to features of the cases which would have been relevant at trial (Bibas 2004). Similarly, research on 'cop culture' has shown that the negative attitude police officers outwardly appeared to have towards suspects and their rights was not necessarily carried through into the way they performed their jobs (Waddington 1999). Although there may therefore be some support for the faith traditionally placed in the defence lawyer to fearlessly represent his client, in reality it appears to be limited to faith in the lawyer's ability to bargain with the defendant's interests at heart, and the need to bargain is regarded as almost inevitable by Emmelman. In Alschuler's influential work on the defence attorney's role in plea bargaining, he advocated the abolition of plea bargaining as the only solution to the problems inherent in the relationship between the defence lawyer and his client and wrote that plea bargaining 'is necessarily destructive of sound attorney-client relationships. This system subjects defense attorneys to serious temptations to disregard their clients' interests – temptations so strong that the invocation of professional ideals cannot begin to answer the problems that emerge' (1975, p.1180), and it is submitted that this is also largely true of the current situation in England and Wales. Research which suggests that lawyers could be deliberately or subconsciously masking due process or adversarial values demonstrates how far removed the reality of the defence

lawyer is from the idealised figure we have come to expect; when compromise which at least outwardly favours working relationships over defendants' interests is the accepted norm.

#### 3.4.6 The principal – agent problem

The principal – agent problem is applied most often in the fields of political science and economics, (Stiglitz 2008) but also has direct application to the defendant – lawyer relationship, and more widely to the other relationships discussed earlier in this chapter. Problems in the principal - agent relationship most commonly arise in situations in which the agent (here, for the time being, the defendant) instructs an agent (the defence barrister) to perform a task for him. The assignment of that task carries with it uncertainties and risk because the principal has no way of knowing whether the agent will perform the task adequately, and indeed the agent may have strong self interests not to perform to the best of his ability. The task may, for example, be costly, time consuming, challenging, or of limited interest to the agent. In order to limit the agent's possible shirking, incentives must be put into place to ensure that the agent's interests coincide with those of the principal. Incentives commonly applied may be material, coercive, moral, or a combination of two of more of these broad types.

When considering material incentives, it has already been established earlier in this chapter that criminal defence barristers are, (or consider themselves to be), poorly remunerated for their work, and far from aligning the lawyer's interests with those of the defendant, the current fee structure is more likely to cause their interests to diverge by indirectly providing incentives to crack cases in some circumstances. Additionally, as Stephen and Garoupa have highlighted, in publically funded criminal defence work, there is another principal – agent relationship; the relationship between the defence lawyer and the funding body (2008, p. 343). Furthermore, the barrister will have been instructed by a solicitor, and in some senses also acts as the agent in that relationship. The criminal defence barrister may therefore find himself torn between his various agency roles. Aligning his own material interests with the interests of a defendant who is likely to have limited knowledge of the legal and procedural issues involved, in addition to the interests of the instructing solicitor (see 3.4.1 above), the costs driven targets of the Criminal Defence Service, as well as the barrister's overriding duty to the court and the administration of justice becomes a near impossible task. Material incentives therefore do little to regulate competing principal – agent interests.

Despite (or perhaps because of), the guidance provided by the *Turner* rules and the codes of conduct, there is little coercion which can be brought to bear to ensure a barrister fulfils the tasks required of him by his defendant principal. It was not until 2000 and the case of *Hall v Simons* that barristers lost their immunity from being sued for negligence.<sup>93</sup> The asymmetry of information and power is still acute, and the defendant is unlikely to be able to accurately gauge whether the barrister is acting in his (the defendant's) best interests and the case law reviewed earlier in this chapter demonstrates that the appellate courts have proven themselves reluctant to intervene in cases in which barristers were alleged to have pressurised defendants to plead guilty. Tague argues that applying the principal – agent model to the barrister – lay client relationship is not workable as the model could lead to the barrister having to argue a case in a way which was ineffective or unethical if he were compelled to adhere to the defendant's precise instructions (Tague 2001, pp.153 – 154) and this goes some way towards explaining the courts' unwillingness to impose coercive regulation of the principal – agent relationship.

The loose ethical guidance on the matter, in addition to the fact that barristers have competing interests which may detract from their loyalty to individual defendants and their commitment to adversarialism makes it unlikely that all defending barristers feel a strong moral obligation to act in the best interests of the client. However, not acting in the defendant's best interests could range from the overt pressure depicted by Baldwin and McConville (1977) to interpreting the best interests of the client in a way which may not tally with the defendant's view of his best interests, were he to be aware of all the material facts. Alschuler quotes one lawyer in his study as stating that '[a] lawyer's function is simply to minimise the painful consequences of criminal proceedings for his client...So long as there is a 10 per cent chance of a prison sentence, the client is better off to plead' (1975, p. 1279). It may, however, be that were a defendant aware that the chance of a prison sentence was only 10%, he would prefer to plead not guilty if he were in a position to exercise the authority of his role as principal in the relationship. The asymmetry and lack of information which characterises the principal – agent problem is all the more acute in the client – lawyer relationship, and in Alschuler's lawyer's scenario the agent possesses far greater specialist knowledge and has the power to relay information to the principal in a way which leaves the principal little choice but to regard the agent's advice as being in his interests.

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<sup>93</sup> [2000] 3 WLR 543, [2000] 3 AER 673.

The principal-agent problem thus goes some way towards addressing an obvious question which sceptics could level at research which suggests that defence lawyers encourage their clients to plead guilty, namely why would defendants (particularly innocent defendants) simply comply and plead guilty? There are three major approaches which have been put forward to explain why clients themselves become subsumed in the organisational factors which provide the context for their lawyer's working practices: the professional model; lawyers as translators of defendants' interests; and lawyers' monopoly of knowledge (see McConville et al 1994, p.129). What each has in common is that the client / defendant often simply does not see himself as the principal and therefore makes little or no attempt to exert his authority as principal. In the professional model lawyers deploy expert knowledge in the best interests of their clients; these interests are seen as being best served through the routine processing of guilty pleas since defendants usually have no factual or legal arguments to set against prosecution evidence. Defendants comply because they know this and make autonomous choices. This type of model would be supported by McCabe and Purves' conclusions which found that defendants made rational and pragmatic choices to plead guilty when faced with the evidence against them (1972). In a model which regards lawyers as translators of interests presented by clients, lawyers are 'conceptive ideologists' who reconstitute interests in terms of a legal discourse which has trans-situational applicability (Cain 1979). This corresponds with Blumberg's argument that in the USA, 'All court personnel, including the accused's own lawyer, tend to be co-opted to become agent mediators who help the accused redefine his situation and restructure his perceptions concomitant with a plea a guilty' (1967b, pp. 19-20). Related to this model is the conceptualisation of lawyers as professionals, who, in common with other professional groupings such as doctors and accountants, control clients through their monopoly of expert knowledge. Legal training and specialised knowledge enable lawyers to act as intermediaries between a client's narrow self-interests and the legal system (Cain 1979).

Each of these models has at its core a simple principle: defendants are in a vulnerable position, lawyers think they know best, often do know best, and defendants have no one else in whom to put their faith, so the barrister takes over the role of the principal in the relationship. This may lead to an unnecessary willingness to please the lawyer, as occurred in Case 91 of this study's sample, in which the defendant, who had been charged with assault occasioning actual bodily harm, changed his plea from not guilty to guilty, but then applied to vacate his plea. The following is an extract from his statement explaining why he had changed his plea:

‘I changed my statement when I was first seeing my barrister, Miss X, because I didn’t think she believed me. I thought she would not take my case and I would have no barrister to represent me in court so I tried to change my story to fit with the evidence I have seen and with what I thought the barrister wanted to hear and fit better.’

McConville et al. also write of the ‘submissiveness’ of some defendants they encountered and that they were ‘overready to acquiesce’ (1994, p. 255) and Hedderman and Moxon’s finding that 68% of their sample of defendants agreed with the statement ‘I thought I would be found guilty, no matter how I pleaded’ (1992, p.24) points towards a willingness (or perhaps more aptly, a resignation) to acquiesce to inducements to plead guilty. If Case 91 is an accurate representation of events, the defendant’s fear of being left unrepresented, and perhaps being convicted in any case, was so great that he preferred instead to fabricate a version of events which made him guilty of the offence charged. The question which would have to be answered in this case is whether the barrister had given the defendant any cause to feel she did not believe him. If she did, the case represents the detrimental effects of barristers’ assumptions of the guilt of their lay client. If she did not, it is indicative of the dilemma that barristers who act perfectly within all legal, ethical and professional standards, and do not exert any pressures on defendants can still, dependent on the interpretations of defendants, be perceived as creating a pressure to plead guilty.

### **3.5 Conclusions**

This chapter has brought together a wide range of issues regarding the work of legal professionals (defending barristers in particular) and has analysed them in the context of their relationship with cracked trials, late guilty pleas, and plea bargaining. Lawyers undoubtedly play a pivotal role in the process both of trials cracking as a result of defendants entering guilty pleas, and more generally in the process of plea bargaining. Many factors tie the defending barrister to the cracked trial, and research shows that his last minute advice is often what prompts defendants to change plea (Bottoms and McClean 1976; Baldwin and McConville 1977; Zander and Henderson 1993). In part this is a result of the divided legal profession which creates a barrier between the defendant and his trial advocate. The defendant’s direct contact will be almost exclusively with the solicitor or unqualified paralegals (Morison and Leith 1992; McConville et al. 1994) and he may not meet the barrister briefed to represent him at trial until the day of the trial, as the level of

discontinuous representation is such that the barrister originally instructed for the Plea and Case Management Hearing may not be available. It is inevitable that there will be many cases in which it becomes apparent to the barrister on the morning of the trial that the evidence against the defendant is very strong (particularly if all the prosecution witnesses have arrived); perhaps stronger than the solicitor had been able to appreciate at an earlier stage. In such a situation, it is perfectly clear that the legal and ethical guidelines permit the barrister to advise his lay client, in strong terms, that a conviction is likely and ensure that the defendant is aware that a guilty plea would result in a reduction in sentence, but that the final decision is the defendant's alone. Although criticisms can be levelled at the existence of the sentence discount, or structural flaws in the criminal justice system which lead to a crystallisation of the issues at such a late stage, there is little scope for questioning the ethics of a defence lawyer in this scenario. On occasion, the reality may not be so straightforward: defendants can perceive advice which is within the ethical guidelines as pressure, and there is little that can be done to remedy this, other than to ensure that barristers are sensitive to their lay clients' vulnerabilities. The evidence (both from my own data and the previous literature) which has documented defence lawyers' dismissive attitudes towards defendants and towards defendants' accounts of the facts, suggests this is at times not the case. Moreover, there will be occasions when defence barristers *do* exert pressure on defendants to plead guilty, not least because it can be in their professional and financial interests to strike a bargain with the prosecution and crack the case (although Tague puts forward recent findings on the London Bar to the contrary (2006, 2007)), and the skewed principal – agent relationship between the defendant and his barrister leaves the defendant without the knowledge or power to enforce a particular course of action in his case, again making it unlikely that a defendant is afforded much scope to play the system and manipulate the timing of his plea.

This chapter has demonstrated that, for the most part, the evidence on the lawyer's role in cracked trials suggests that the nature of defending barristers' workloads provide strong financial and administrative incentives for them to encourage clients to plead guilty. This, coupled with the depersonalised attitudes barristers appear to have towards criminal defendants (perhaps inevitable given the short time they spend with them, and the greater benefits of loyalty to the system as a whole), engenders a situation whereby barristers routinely engage in plea bargaining in order to make a guilty plea an attractive proposition for their client. Morison and Leith's argument that '[t]he culture of the Crown court is one of crime control and this is a view taken as much by most defence barristers as by those who are associated with the prosecution' (1992, p. 114 – 121) rings true. This is not



necessarily manifested in overt pressures of the magnitude of those documented by *Negotiated Justice* (1977) and may be motivated by a genuine belief that it is in the best interests of their clients, but it nonetheless contributes greatly to the incidence of late guilty pleas. Furthermore, Tague (2006, 2007) and Sommerlad's (2001) findings suggest that there may be regional differences in the weight given to adversarial principles and the advice given to defendants on plea, and the importance of local culture in adversarialism and cracked trials requires further empirical research. It is nonetheless barristers, not defendants, who have the greater means and motive to play the system.

The following chapter presents the quantitative and qualitative data collected by this study on those aspects of cracked trials and plea bargaining which do not relate to the role of the defence lawyer, and the data are analysed and interpreted in Chapter 5.

## CHAPTER 4

### IDENTIFYING FEATURES OF CRACKED TRIALS

#### 4.1 Introduction

This chapter presents the data (both quantitative and qualitative) extracted from Crown Prosecution Service files, and where appropriate also draws on material recorded during interviews with legal professionals (except where it relates directly to the role of the lawyer, previously discussed in Chapter 3). In doing so, the thesis moves on from exploring the lawyer's role in cracked trials and plea bargaining, and begins to investigate additional features of cracked trials. The data are presented here with limited analysis, and are analysed in depth and interpreted in Chapter 5. As the data collection was in large part exploratory, these findings represent the wide range of issues that arose in the analysis. Although given the non-random nature of the sampling process, and the sample size, it is not possible to identify causal relationships between certain features of trials and the trial's outcome as cracked or otherwise, it is possible to identify some features as potentially significant to the understanding of the causes of cracked trials.

#### 4.2 Overview of the data

Data were extracted from 119 prosecution files of cases finalised at Manchester Minshull Street Crown Court between June 2006 and December 2006, which represented the cases against 151 individual defendants. The quantitative data collected from the Crown Prosecution Service files can be grouped into seven core categories:<sup>94</sup>

- (i) Defendant data (age, employment status, race, previous convictions);
- (ii) Offence data (the offences on the indictment, and the facts thereof);
- (iii) Case outcome data (the means by which the case – and individual counts within the case – were disposed of. This included information about the plea(s), sentence, and the number of hearings);
- (iv) The number of counsel each defendant was represented by in total;
- (v) The nature of the evidence against the defendant;
- (vi) Whether a *Goodyear* indication or basis of plea was given; and

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<sup>94</sup> The data collection form used is reproduced at Appendix A.

- (vii) Whether any specific offers to enter or accept guilty pleas were made.

In addition to the quantitative data extracted from the case files, any relevant qualitative information was recorded, which allowed for expansion of the above data.<sup>95</sup> Interviews with legal professionals were semi structured, and as such covered similar but by no means identical ground. All interviewees were asked about their views on cracked trials in general and what they felt the causes were.<sup>96</sup>

The remainder of this section provides an overview of the composition of the case files sampled and where possible, a comparison with the data available for Minshull Street Crown Court and / or regional or national data. Tests of significance have not been carried out as the sample was not drawn at random and is not representative (see Chapter 3.3), but it is nonetheless instructive to set out the respective figures in order to make some evaluation of the sample in relation to population it is drawn from.

The case files were drawn from three geographical CPS units which cover the south and east of the Greater Manchester area (Trafford, Stockport and Salford). Male defendants made up by far the majority of the sample (90%). At Minshull Street Crown Court, during the seven months from which cases for this study were drawn, 11% of defendants were female and 89% male. The proportion of female defendants is also comparable with that recorded by the Criminal Statistics annual report in 2006, published by the Ministry of Justice, which show that 10.35% of defendants over 18 committed for trial at the Crown Court were female.<sup>97</sup> The defendants in this study's sample ranged in age from 15 to 58, and the mean age of the defendants was 27.8 years.

The breakdown of the defendants' employment status (as recorded on police charge sheets) is shown below:

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<sup>95</sup> Common examples were: the reasons given for a change of plea, the terms of a basis of plea, communication between prosecution and defence as to which pleas or charges might be acceptable, and references to witness reliability.

<sup>96</sup> The outline interview schedules used are reproduced at Appendix B.

<sup>97</sup> See figures at Table 2.10 of the 2006 Criminal Statistics, which show that a total of 73,400 defendants over 18 were proceeded against and committed for trial at the Crown Court in 2006, 7600 of whom were female.

Fig. 4.1 Defendant employment status

<b>Employment status</b>	<b>Number of defendants</b>	<b>Percentage of sample<sup>98</sup> (%)</b>
Full time	55	36.4
Part time	3	2.0
Self employed	1	0.7
Unemployed	80	53.0
Student	4	2.6
Unknown	8	5.3

It is generally accepted that unemployment rates among those charged with, or convicted of, criminal offences are considerably higher than those of the general population and the 53% unemployment rate within this study's sample is not dissimilar to that of the population of defendants in criminal cases nationally (see for example Metcalf, Anderson, and Rolfe, 2001).

Fig. 4.2 Defendant ethnicity

<b>Ethnicity</b>	<b>Number of defendants</b>	<b>Percentage of sample (%)</b>	<b>Percentage of all defendants at Minshull Street Crown Court June – December 2006 (%)<sup>99</sup></b>
White European	132	87.4	82.6
Dark European	1	0.7	n/a <sup>100</sup>
Afro-Caribbean	5	3.3	2.0
Asian	8	5.3	3.1
Arab	3	2.0	0.7
Unknown	2	1.3	8.8

Fig. 4.2 above presents the breakdown of the sample's ethnicity (recorded by, and using the same categories as, police charge sheets). The ethnicity of the sample was overwhelmingly white (87.4%), which is largely representative of Greater Manchester's overall ethnic composition (the 2001 census recorded Manchester's general population as being 91.1% white).<sup>101</sup> In terms of the population of defendants nationally, the 2006 Statistics on Race and the Criminal Justice System record that of 63,307 defendants tried on indictable offences in England and Wales during 2006, 45,047 (71.2%) were white (Jones and Singer

<sup>98</sup> Figures are throughout this chapter rounded to the nearest decimal point.

<sup>99</sup> Data obtained from the Performance Directorate of HMCS.

<sup>100</sup> The court data did not include a 'dark European' category.

<sup>101</sup> It was not possible to obtain comparable statistics solely for the three areas of Manchester from which the sample cases were drawn.

2007). It appears therefore that white defendants were overrepresented when compared with the national data, but as the fourth column of Fig. 4.2 shows, white defendants within the sample do not appear to have been overrepresented to the same extent when compared with the population of defendants whose cases were finalised at Minshull Street Crown Court during the months from which this sample was drawn. 87.4% of this study's sample were white, compared with 82.6% of defendants whose cases were dealt with at the court between June and December 2006. As Fig. 4.2 shows, the sample contained slightly higher percentages of minority ethnic defendants than the overall Minshull Street caseload during the relevant months, (although 8.8% of defendants from the Minshull Street data were of unknown ethnicity, compared with only 1.3% from the study's sample, which could account for the difference).

The offences within the sample spanned a broad spectrum, but included no murder cases as Minshull Street Crown Court is a third tier Crown court and murders are sent to Manchester Crown Square Crown Court. In total, the 119 cases represented 396 individual counts on indictments against defendants, within sixteen separate offence groups, the composition of which is illustrated by Fig. 4.3 below. The offence categories are those used by the Courts Service when collating offence data, and each of the offences in the CPS sample were placed within the relevant offence group according to these criteria. The second column of Fig. 4.3 sets out the total number of counts within that offence group, and the third column presents the percentage as a proportion of the total number of counts of each offence group within the sample. The fourth column shows the percentage of Manchester Minshull Street Crown Court's trial receipts during June to December 2006 by offence group.

Fig. 4.3 Total number of counts by offence group, and Minshull Street Crown court receipts by main offence group

Offence group	Number of counts	Percentage of sample (%)	Minshull Street Crown Court trial receipts June – December 2006 (%) <sup>102</sup>
Violence (other)	92	23.2	17.7
Other indictable offences (excluding motoring offences)	75	18.9	22.5
Other summary offences (excluding motoring offences)	48	12.1	14.1
Theft and handling	46	11.6	7.2
Robbery	34	8.6	6.3
Burglary	24	6.1	3.8
Criminal damage	22	5.6	2.1
s.18 OAPA	14	3.5	3.6
Sexual offences (excluding rape)	11	2.8	7.2
Drug offences	8	2.0	5.0
Rape	7	1.8	1.6
Breach	5	1.3	2.7
Attempted murder	4	1.0	0.2
Indictable motoring offences	3	0.8	2.1
Summary motoring offences	2	0.5	1.4
Manslaughter	1	0.3	0.4

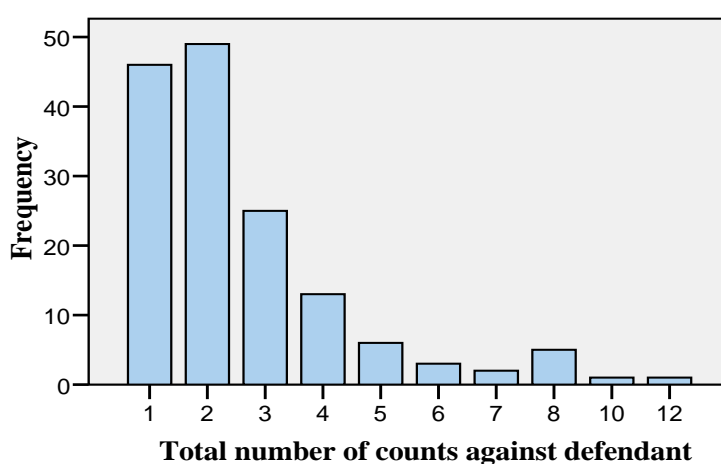
My own data presented in Fig. 4.3 record the offence group of individual counts, and the court data record trial receipts, so the two sets of percentages are not directly comparable as the court data use the most serious offence and this becomes the offence group for the case, even if it includes several less serious offences. For the purposes of a broad comparison, however, the data is adequate and shows that the spread of cases across offence groups was for the most part in line with the proportions heard at Minshull Street Crown Court during the months from which the sample was drawn. Of the larger offence groups, my own sample had slightly greater proportions of violence (other), theft and handling stolen goods, robbery, burglary and criminal damage. The sample contains slightly smaller proportions of non-motoring ‘other’ indictable and summary offences, drugs offences and a notably smaller proportion of non-rape sexual offences (although the proportions of rape cases are very similar). The largest two groups in the sample were both ‘other’ categories; other violence (all offences of violence excluding attempted murder,

<sup>102</sup> Data obtained from the Performance Directorate of HMCS.

manslaughter and grievous bodily harm with intent under s.18 of the Offences Against the Person Act 1861), and ‘other’ indictable offences.<sup>103</sup> The offences within these two groups covered a broad spectrum of criminal offences, which may account for the relative size of the groups. It also suggests that the offence group categories used by the Court Service may be too broad to use as a tool with which to make meaningful observations about the relationship between offence types and the likelihood of a case cracking.

Fig. 4.4 below shows the distribution of the number of individual counts against defendants.

Fig. 4.4 Number of counts against individual defendants



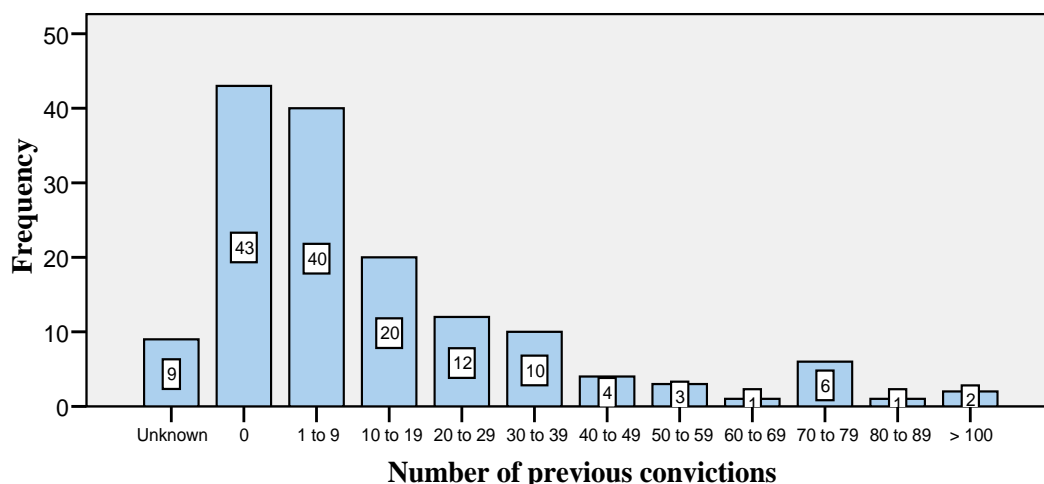
In 106 cases (70.2%), there were two or more counts against the defendant; three or more counts in 56 cases (37%), and four or more counts in 31 cases (20.5%). In only 45 cases (29.8%) was there just one count on the indictment, which suggests that the type of offending alleged of the defendants within the sample was such that it covered a period of time or, more often, represented a series of events which could be broken down into multiple criminal offences for the purposes of drafting the indictment. It was not possible to obtain any national or local statistics (published or otherwise) which record the number of counts against individual defendants with which to compare this finding.<sup>104</sup>

<sup>103</sup> This study’s analysis was not impeded by the broad ‘other’ groupings, as being able to analyse cases more closely by collecting data from files meant it was not restricted to these categories.

<sup>104</sup> Freedom of Information Act requests were made to HMCS and the CPS, but it is not data which appears to be recorded and collated centrally, only on individual defendants’ files.

Fig. 4.5 below shows the number of previous convictions recorded against defendants.

Fig. 4.5 Number of previous convictions



The number of previous convictions within the sample spanned a vast range, from the 43 defendants (28.5%) with no previous convictions to the defendant with 155 previous convictions. A significant proportion of the sample (41.5%) had ten or more previous convictions.<sup>105</sup>

Where it has been possible to make an evaluation of the sample's composition compared with court or national figures, it appears that in terms both of the demographics of the defendants, and the types of cases, the cases sampled for this study are broadly speaking comparable and the proportions not wildly dissimilar to Minshull Street Crown Court's caseload at the time the cases were sampled, and of Crown courts nationally. Furthermore, as the sample is not random and is therefore not intended to be representative, the absence of tests of significance to demonstrate its representativeness does not create methodological problems for the aims of this study.

<sup>105</sup> It was not possible to obtain data on the number of previous convictions held by defendants nationally, or at Minshull Street Crown court. Freedom of Information Act requests were made to HMCS and to the CPS but centralised data on previous convictions are held only on the Police National Computer (PNC), which holds data on individuals, rather than by court and / or by time period. Attempting to gain access to this data by obtaining the names of all defendants whose cases were heard at Minshull Street Crown court over the six month period, and then obtaining details of their previous convictions from the PNC (in the event that access to the data would have been granted) would have been disproportionately time consuming.



### 4.3 Overall trial outcomes

The trials in the sample were all either effective or cracked; there were no ineffective trials as the sample of files received were all completed cases. As the sample consisted of cases which had been listed for trial, and excluded those which had been disposed of at an earlier stage, each of the 151 defendants in the sample had initially pleaded not guilty to each of the charges against them, or had failed to enter a plea.

In 35 cases (23.2%), the case was effective in the sense that all counts within the case were disposed of by way of a conviction, jury acquittal or judge directed acquittal. The number of cases in which at least one, but not necessarily all counts were disposed of by one of these means was higher: 49 cases (32.5%). Over three quarters of the sample (76.7%) therefore had one or more individual count outcomes which were not effective.

In 75 out of the 151 cases against defendants (49.6%), *all* the counts within those cases were disposed of either by way of a guilty plea or by the prosecution offering no evidence, and thus met the administrative criteria for definition as a cracked trial. This was the proportion of cracked trials which had been anticipated and is comparable with the 48.9% overall cracked trial rate at Minshull Street Crown Court during that year (Crown Court Annual Report, 2006/2007).

### 4.4 Outcomes of individual counts within trials

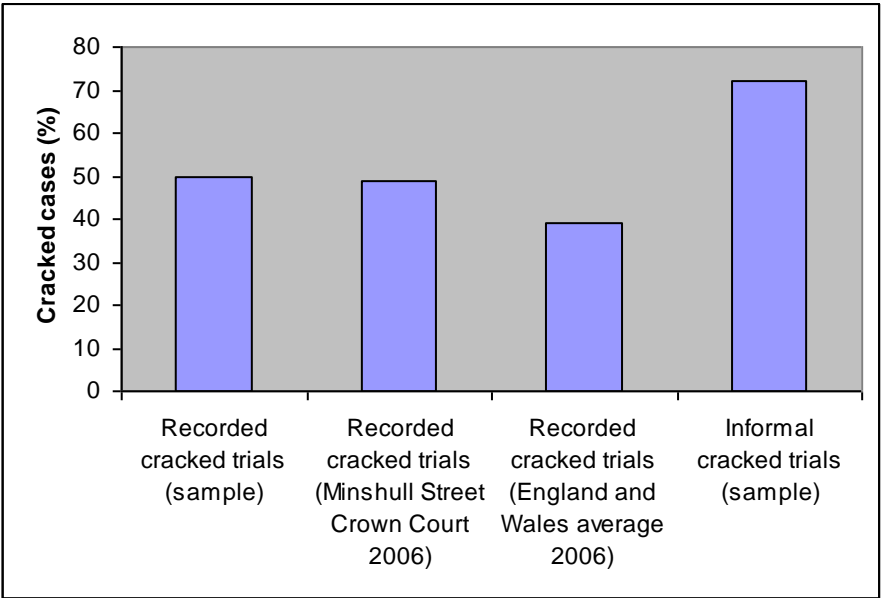
It became apparent during data collection that in many cases, if each of the individual counts on the indictment within a case were taken into account, there was a wide variety of outcomes *within* individual cases; cases were frequently comprised of one or more counts which cracked, and one or more counts which did not crack. Given the high proportion of cases which contained multiple counts (see Fig. 4.4) this was inevitable; it is unlikely that all counts within a case will always be disposed of by the same means. Even if any possible bargaining is disregarded, common sense dictates that there will often be different evidence available for different offences represented on an indictment, or that an offender may be more willing to plead guilty to some counts on an indictment than to others.

This thesis therefore re-examines the definition of a 'cracked' case and conceptualises it more broadly. If a case against a defendant is defined as 'cracked' on the basis that at least one count was disposed of by a guilty plea or by the prosecution offering no evidence, then

109 of the 151 cases against defendants (72.2%) were cracked (referred to hereinafter as an ‘informal’ cracked case); a considerably greater proportion than the 49.6% of cases in which all counts cracked (referred to hereinafter as a ‘recorded’ cracked case).<sup>106</sup> This core typology of cracked trials makes a contribution to the literature in the field by enabling an analysis (at Chapter 5) which challenges assumptions about the dynamics and processes of cracked trials; assumptions upon which policy rests.

Fig. 4.6 below illustrates the considerable difference between the percentage of informal cracked cases within the sample, and the percentage of recorded cracked cases within the sample, as well as the national average and Minshull Street Crown Court cracked trial rates.

Fig. 4.6 Percentage of trials cracked, by data source and type (2006)

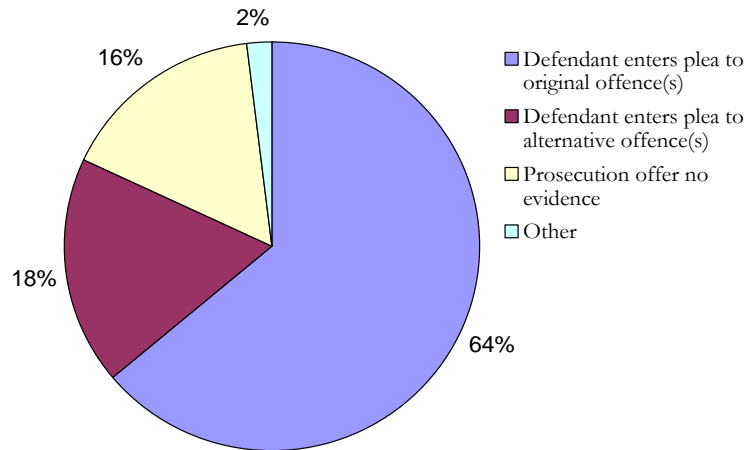


As the section below demonstrates, the way in which cracked trials are defined has a direct and significant bearing on the way in which reasons for cracked trials are calculated.

<sup>106</sup> In 7 cases, the original indictment was missing and it was not clear what the outcome related to; these cases are excluded from this statistic. Thus although there were 151 cases and 35 were entirely effective, there were only 109 confirmed Type 1 cracked cases, rather than 116.

## 4.5 Reasons for cracked trials

Fig. 4.7 Reasons for cracked trials as published by 2006 Judicial Statistics<sup>107</sup>



A natural conclusion which could justifiably be drawn from the statistics reproduced at Fig. 4.7 is that it is overwhelmingly defendants' late decisions to plead guilty which are the causes of cracked trials. As discussed in Chapter 1, it is a conclusion which has been widely accepted by the criminal justice system and is a view which was subscribed to by both the 1993 Runciman Commission and the 2001 Auld Report. Most legal professionals interviewed for this study also felt that it was defendants' late decisions which were more often than not responsible for trials cracking:

Barrister A: 'You can't get a man to face reality until he has to...ultimately, it's punters who cause trials to crack.'

Court Administrator B: 'Defendants wait for the day of doom before they face up to their guilt...they're playing the system too, to see what they can get out of it if they hold on.'

Solicitor A: 'The main reason for trials cracking is defendants changing their minds, confronted with the prospect of stepping into court and maintaining a not guilty plea when the evidence is, and perhaps always has been, stacked up against them... that's the obvious reason, the classic reason.'

<sup>107</sup> The 2% 'Other' category was comprised of cases in which the defendant was unfit to proceed, deceased, or bound over to keep the peace.

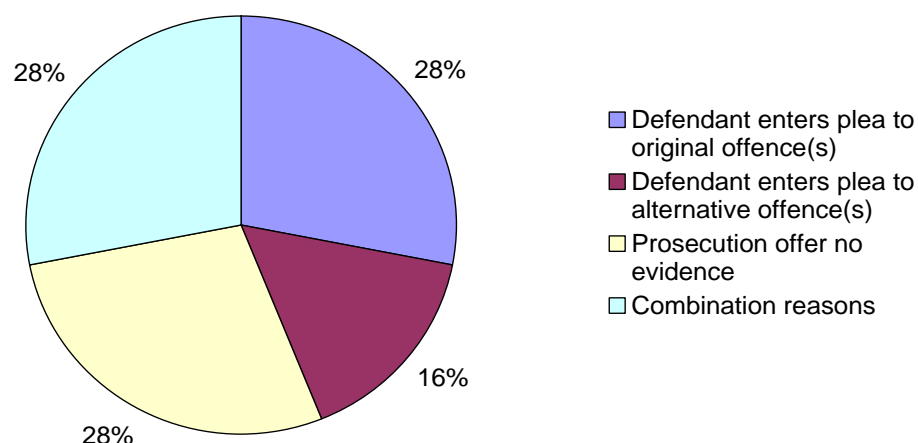
Judge A: 'The main reason for cracked trials, I think...is because one has got to remember that the clientele of the criminal courts is not the same as the clientele of the senior common room at Manchester University. [They lead a] very chaotic lifestyle. People who live in that way... they're not necessarily the sort of people who are going to organise their affairs with meticulous care... asking them to engage in the litigation process...is very unrealistic.'

Judge B: 'The criminal has an entirely different agenda, everything in life is a gamble for them...It's not that they don't act rationally, but they see things in a short term light and would rather see what happens on the day.'

Barrister C, Barrister D and Court Administrator B also commented that they thought the time of year made a difference and that defendants manipulated their pleas to avoid being sentenced before a summer holiday or before Christmas, and would initially plead not guilty in the expectation that they would be released on bail and change their pleas at the later date of the trial.

Despite these views and the existing administrative statistics, the quantitative data collected for this study would suggest that the reasons for trials cracking within the sample were not as centred on defendants' decisions as might have been expected, particularly when cracked cases with a combination of causes were considered. The table below illustrates the percentages of cases cracking by reason (as a proportion of recorded cracked trials, defined on the same basis as the Judicial Statistics define cracked trials):

Fig. 4.8 Reasons for recorded cracked trials within sample



The defendant entering a late guilty plea(s) to offence(s) originally on the indictment was the sole reason for the case cracking in only 28% of recorded cracked cases. In the remaining recorded cracked cases (72%), the reason for the crack was that the prosecution offered no evidence (28%), the defendant offered and/or the prosecution accepted a guilty plea to alternative offence(s) (16%), or a combination of those reasons (28%).

In 90 cases (59.6% of the total sample), defendants did, however, change at least one plea from not guilty to guilty. In 62 cases (41.0%), the change of plea was to a count(s) originally on the indictment, and in 27 cases (17.9%), the plea(s) was changed from not guilty to guilty to an alternative count(s).

Although interviewees emphasized the role played by defendants' late decisions, they did also acknowledge that other factors could sometimes be equally, if not more, significant:

Barrister A: 'You often don't have the evidence until a late stage so the defendant can't be properly advised on their plea until a late stage...this'll often result in a cracked trial too.'

Barrister D: 'When a case cracks from the prosecution side, it'll generally be problems with witnesses... or police officers losing exhibits, you'd be amazed at the number of cases in which vital evidence has just disappeared'.

Judge A: 'The second main reason for a cracked trial is that often the prosecution witnesses, if it's a domestic fight or something, are as chaotic as they [defendants] are.'

The quotes extracted above all identify evidential or witness related factors as playing a key role in cracked trials (aside from, or contributing to, defendants' last minute decisions to plead guilty) and additional data recorded on these issues are presented in the following section.

#### **4.6 Victims and other witnesses**

The availability and perceived reliability of witness testimony played a large role in the cases in this study, initially simply in terms of the frequency with which the case file indicated that there was an issue relating to a victim or another prosecution witness. In 64 cases against defendants (43% of the total sample), it was possible to identify a victim or other witness related issue. In 14 cases (9.3%), witnesses retracted statements, in 18 cases (11.9%), the file noted that at least one victim or other witness was reluctant to give evidence in court, and in 26 cases (16.6%), the file made reference to the unreliability of at least one victim or other witness. Within the category of 'other' victim or witness issues, of the seven cases against defendants (4.6%) which fell into this category, three were instances where it was recorded that the victim had a particularly strong preference for continuing with the prosecution of a specific offence, after the prosecution had put to the victim the possibility of accepting a guilty plea to an alternative or lesser offence.

Victim / witness factors were a common feature of both informal and recorded cracked cases. Fig. 4.9 below shows the frequency with which victim / witness issues occurred within both the effective and the informal cracked cases.

Fig. 4.9 Frequency of victim issues within effective and informal cracked cases<sup>108</sup>

<b>Victim/ Witness Issue</b>	<b>Frequency - effective cases</b>	<b>Frequency Informal cracks</b>	<b>- Total</b>
Retraction	1 (6.7%)	13 (26.5%)	14
Reluctance	3 (20.0%)	15 (30.6%)	18
Unreliability	5 (33.3%)	21 (43.0%)	26
Other	6 (40.0%)	0 (0.0%)	6
<b>Total</b>	<b>15 (100%)</b>	<b>49 (100%)</b>	<b>64</b>

As demonstrated by the data set out in the table above, of those cases where a victim or other witness issue could be identified within the CPS file, 15 did not crack, but over three times as many (49 cases) did contain at least one count that cracked. As proportions, however, there is little difference between the two figures, 42% of the effective cases featured witness related issues, as did 44.9% of the informal cracked cases, and 48% of recorded cracked cases.<sup>109</sup> Of the 49 informal cases, 36 were also recorded cracks.<sup>110</sup> Unreliability of witnesses was the issue most frequently recorded within the informal cracked cases (present in 43% of the cases).

Of the informal cracked cases in which victim or other witness issues were identified, the reasons for the cases cracking were as follows:

Fig. 4.10 Reasons for informal cracks in cases with victim / witness issues

<b>Reason for informal crack</b>	<b>Frequency</b>	<b>Percentage of cases with victim/witness issues (%)</b>
Defendant offers guilty plea to original count(s)	3	4.7
Defendant pleads to alternative count(s)	6	9.4
Prosecution offer no evidence	20	31.2
Combination of reasons	20	31.2

The most common outcome for cases in which there were identifiable issues concerning

<sup>108</sup> Figures in brackets refer to the percentage of the total of effective cases in the first column, and the percentage of the total of informal cracked cases in the second column.

<sup>109</sup> It would be instructive to be able to differentiate the effective cases which resulted in conviction from those which resulted in a judge directed or jury acquittal; this was however not possible within the structure of the quantitative data which was adopted for the purposes of the SPSS analysis.

<sup>110</sup> This includes those cases in which there was only one count.

the availability or reliability of victims or witnesses was the prosecution offering no evidence to all counts, or a combination of reasons; in only 4.7% of cases with victim or witness issues did the defendant plead guilty to the original indictment.

The qualitative data extracted from the case files shed further light on the circumstances of many of these cases and illustrate the potential for the part played by the victim or other witnesses (or lack thereof) to affect the outcome of cracked cases. The circumstances of four such cases are summarised below:

Case 117: The defence had suggested that bindovers and compensation would be an appropriate punishment in the case (both defendants were charged with one count of actual bodily harm under s.47 of the OAPA 1861, at the lower end of the range of severity covered by that offence). The file indicated that as the victim was unhappy with this suggestion, the prosecution proceeded to trial and the defendants were convicted.

Case 67: The defendant offered a guilty plea to an assault contrary to s.39 of the Criminal Justice Act 1988, in place of the charge of actual bodily harm under s.47 of the OAPA 1861 originally charged. The file stated that the victim and the prosecution were satisfied with this outcome; there were damaging witness preconvictions, and the victim had been unwilling to give evidence or to sign the necessary medical consent forms for evidence of his injuries to be used in evidence, thus weakening the prosecution case.

Case 68: This case concerned gang related violence; the defendant had been charged with causing grievous bodily harm with intent (s.18 of the OAPA 1861) and three counts of witness intimidation under s.51 of the Criminal Justice and Public Order Act 1994. Of the seven prosecution witnesses due to give evidence, only two appeared at court; the other five were deemed to be hostile witnesses or were wanted on warrant. The prosecution file notes that the case worker had been told: 'in the circ[cumstance]s, tell counsel to accept any sensible plea'. A guilty plea to one count of actual bodily harm contrary to s.47 of the OAPA 1861 was accepted.



Case 84: This was a robbery charge in which it appeared that the defendant was well aware that the outcome of the case would hinge on witness attendance. The victim had been reluctant to give evidence from the outset and a witness warrant was subsequently issued for his arrest. The defence canvassed a possible plea of guilty to theft, which was acceptable to the prosecution. The defendant then changed his mind, and maintained his not guilty plea; the prosecution file suggested that the defendant was choosing instead to wait and see if the witness was brought. Unexpectedly, the witness did attend and the defendant once again offered a plea of guilty to theft, which on this occasion was not acceptable to the prosecution. The defendant was tried and convicted of robbery.

#### **4.7 Evidence against defendants**

Another issue which may be relevant to cracked trials and plea bargaining is the presence or otherwise of various types of evidence, which were recorded in each case.<sup>111</sup> These were:

- (i) DNA
- (ii) CCTV
- (iii) Fingerprints
- (iv) Identification
- (v) Admissions
- (vi) Other physical evidence

The table at Fig. 4.11 below sets out the frequency with which types of evidence were noted, and the percentages of those cases which were disposed of by the defendant pleading guilty to all original counts, the defendant pleading guilty to all alternative counts,

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<sup>111</sup> Recording the presence of these evidential factors was by no means an exact method of gauging the strength of the prosecution cases, but for the purposes of this study it did provide a practical means of comparison between cases which contained evidence of various types. In 48 cases (31.7%) more than one type of evidence was recorded within a case, but for the sake of clarity the evidence types referred to in Fig. 4.11 below reflect what appeared to be the predominant type of evidence in the prosecution case. Witness statements were of course also present in each case, but the nature of the content varied so greatly that it would not be meaningful to include them as part of an analysis of the strength of a case. The mean number of witness statements recorded in each case was 8.6, but ranged from cases with just one statement, to cases with over 50 witness statements.

the prosecution offering no evidence to all counts, all counts being effective, and the defendant pleading guilty to at least one count.<sup>112</sup>

Fig. 4.11 Trial outcomes by primary evidence type

Evidence Type	Guilty plea to all counts (original counts)	Guilty plea to all counts (alternative counts)	Prosecution offer no evidence to all counts	All counts effective	Informal cracked case	Total
DNA	2 (16.6%)	0 (0.0%)	1 (8.3%)	3 (25.0%)	6 (50.0%)	12 (100%)
CCTV	6 (20.0%)	1 (3.3%)	1 (3.3%)	7 (23.4%)	15 (50.0%)	30 (100%)
Fingerprint	1 (14.3%)	0 (0.0%)	0 (0.0%)	5 (71.4%)	1 (14.3%)	7 (100%)
ID	4 (9.3%)	3 (7.0%)	9 (21.0%)	13 (30.2%)	14 (35.5%)	43 (100%)
Admissions	5 (33.3%)	2 (13.3%)	1 (6.6%)	1 (6.6%)	6 (40.0%)	15 (100%)
Other physical evidence	11(12.2%)	10 (11.1%)	10 (11.1%)	21 (23.3%)	38 (42.2%)	90 (100%)

The table above shows that other than in cases in which fingerprint evidence was available (where an effective trial occurred in 71.4% of cases and was the most frequent outcome), the most frequent outcome regardless of the type of evidence was an informal cracked case. That fingerprint evidence (arguably second only in reliability to DNA evidence) most commonly resulted in an effective trial is difficult to explain, but may be an anomaly given the limited number of cases in question. Some other noteworthy figures to extract from the data presented in the table are that the greatest proportion of guilty pleas relative to evidence type occurred in cases where there had been some admissions made, which in all fifteen cases had been at the police questioning stage of the case and in 33.3% of cases led to the defendant pleading guilty to the original charges. This is to be expected as reliable admissions would provide for a strong prosecution case (although this does not explain why the defendants in question did not plead guilty at an earlier stage).

## 4.8 Offences

One aspect of cracked trials which has been under researched but is surrounded by a great deal of anecdotal evidence and many assumptions is the relationship between certain types of offence and the likelihood of a cracked trial. Both members of the case progression teams interviewed felt that researching trends in offences was the ‘way forward’ in reducing

<sup>112</sup> The percentages in brackets refer to the percentage of the total number of cases featuring that evidence type which resulted in the specified outcome.

cracked trials; they took the view that certain offences were more likely to crack than others, and that if those offences could be reliably identified they could be singled out for a targeted pre-trial hearing in an attempt to resolve the issues at an earlier stage. A commonly held view, often encountered during informal discussions during the course of this study, as well as during interviews, was that those offence groups which were based around a clear statutory or common law framework (offences under the Offences Against the Person Act 1861 was the example most often given) were more likely to crack than others, as they would lend themselves more readily to a guilty plea to the 'next charge down' being acceptable because there was a clear line of offences of decreasing seriousness, but of the same nature. The gradation of offences within the Offences Against the Person Act 1861 (s.18, wounding or inflicting grievous bodily harm with intent; s. 20, wounding or inflicting grievous bodily harm; s. 47 assault occasioning actual bodily harm) fit easily into a framework which is then in effect continued by 'common' assault under s. 39 of the Criminal Justice Act 1988, affray contrary to s.3 of the Public Order Act 1986, and ss. 4(A) and 5 of the Public Order Act 1986, which criminalise threatening or abusive words or behaviour.

Barrister D felt strongly that these were the cases most likely to crack:

'Fights. Fights, across the board [are more likely to crack]. Two reasons. Because there's the whole graduation of s18, s.20, s.47, common assault, and you can move that up and down the scale as you want. And also there's alongside that, there's all the public order offences, affray, s.4, harassment and distress and all that, and often, in a big fight, where yes, you definitely punched him, and you might have caused some injury, an affray will be a sort of alternative.'

This observation seems to be largely applicable to the cases within the sample, which contained 26 cases involving offences of violence or public order which resulted in guilty pleas to lesser or fewer counts along the violence/public order continuum. Fewer cases of violence or public order (15) proceeded with the indictment unaltered and guilty pleas to, or convictions for, the original counts on the indictment. This does not take account of factors such as where in the hierarchy of offences the original offence was placed and thus the extent of the scope for reductions, but does provide a strong indication that violence and public order offences within the sample were often disposed of by lesser or fewer charges.

Some examples of this were:

- Case 35: The defendant pleaded guilty to s.18 of the OAPA 1861, wounding with intent, as an alternative to attempted murder.
- Case 68: No evidence was offered in respect of the original count of s.18 OAPA 1861 wounding with intent, and the defendant pleaded guilty to a s.39 assault under the Criminal Justice Act 1988 as an alternative.
- Case 29: The defendant was charged with one count of actual bodily harm contrary to s.47 of the OAPA 1861 and one count of s.39 assault under the Criminal Justice Act 1988. The defendant pleaded guilty to the former and the latter was left to lie on file.
- Case 65: The defendant pleaded guilty to one count of affray (s.3 of the Public Order Act 1986) and no evidence was offered in respect of one count of an assault contrary to s.39 of the Criminal Justice Act 1988 and one count of possession of a bladed article (contrary to s.139 of the Criminal Justice Act 1988).

Sexual offences are another group of offences said to often be subject to plea bargains. The apparently frequent reduction of rape charges to lesser sexual offences has been highlighted as an example of a situation in which a charge reduction (specifically where it is the result of a form of plea bargain) could have a particularly large impact on the victim of a crime (see for example Lees 1996, p.103; Fenwick 1997; Sanders and Young 2007, p. 438). However, two barristers interviewed felt that, contrary to this commonly cited situation, in their experience sexual offences were in fact those least likely to crack:

Barrister D: 'There's very rare cases where any sexual allegation is cracked because very often they just won't admit it, or can't admit it, or in fact they didn't do it...They don't lend themselves very easily to a compromise. In fights it's quite easy to see that there may be shades of grey, so even if they plead to the indictment, there's going to be a basis of plea, because the complainants have to an extent, airbrushed their account...and the defendant obviously airbrushes his, oh it wasn't me, it was all them. In sexual assault or the like, it either happened or it didn't. There can't really be shade of grey in there.'

There might be consent issues or the like, but basically, it either happened or it didn't, and there aren't the shades of grey, or the options, or the way to manoeuvre a case that you can with assaults and the like'.

Barrister A: 'Sex offences...they're the last to crack, if they do at all. It's human nature, they don't want to admit it'.

Barrister A also felt that when rape charges were reduced to sexual assault, it was often because there was insufficient evidence to sustain a rape charge from the outset: 'It's a political hot potato so you've got these cases coming through that are overcharged'. One case (Case 8) seemed to illustrate the underlying principle of Barrister A's comment, although in this instance it did not lead to a cracked trial. The defendant was charged with rape in what was in the words of the prosecution file summary a 'finely balanced decision'. The 22 year old defendant had sexual intercourse with a 15 year old girl who in her statement to the police had said that she knew she did not refuse his sexual advances, but that she had felt upset afterwards. Prosecuting counsel felt that a rape charge was appropriate, but the case resulted in a judge directed acquittal.

Two interviewees pinpointed other offences as being those most likely to crack:

Criminal Defence Service Representative:

'Fraud, I'd say, is the most likely to crack, there's so much evidence to trawl through, so many complications that a guilty plea often ends up being in everyone's interests'.

Barrister D: 'Domestic disputes tend to [crack]. Because again there's that, the witnesses won't turn up, but if they do, then the pressure is completely on the defendant. He will almost always look to get out because he knows if you put a partner through it, who's been beaten black and blue, or whatever the circumstances are, and you get found guilty, nobody's going to have any sympathy with you at all'.

Another felt that there were no offences in particular which were more likely to crack:

Solicitor A: 'I don't think any [particular offence] lends itself more or less to it [cracking]. There's always room for negotiation, whether it's fraud or whether it's blue

collar crime’.

Fig. 4.12 below presents the outcomes of each of the 396 individual counts within the sample by offence group. The offence groups are more detailed than the HM Court Service classifications (used in Fig. 4.3) because as the discussion above has highlighted, it is helpful to be able to make distinctions between individual offences within broad offence groups.<sup>113</sup> To some extent, it is artificial to separate counts from cases when considering outcomes, as individual outcomes can be reliant on each other; for example a defendant may plead guilty to a actual bodily harm (s.47 OAPA 1861) on the understanding that the prosecution will offer no evidence in respect of a s.39 assault (Criminal Justice Act 1988). However, in terms of providing a quantitative outline of which offences most frequently resulted in a range of different outcomes, which makes no claims of generalizability, the data presented in Fig. 4.12 represent the most appropriate means of presenting this data. Each row of the table shows the outcomes of counts of that offence; the percentages represent the percentages of the total number of counts of that offence.

Fig. 4.12 Count outcome by offence group

<b>Offence<sup>114</sup></b>	<b>Guilty plea (as original count)</b>	<b>Guilty plea (as alternative count)</b>	<b>Prosecution offer no evidence<sup>115</sup></b>	<b>Effective</b>	<b>Total</b>
s.20 OAPA assault	6 (42.9%)	1 (7.1%)	1 (7.1%)	6 (42.9%)	<b>14</b>
s.18 OAPA assault			7 (63.6%)	4 (36.4%)	<b>11</b>
s.47 OAPA assault	13 (39.4%)	2 (6.0%)	9 (27.3%)	9 (27.3%)	<b>33</b>
s.39 CJA assault	7 (26.9%)	5 (19.2%)	11 (42.3%)	3 (11.5%)	<b>26</b>
Affray	4 (12.9%)	14 (45.1%)	9 (29.0%)	5 (16.1%)	<b>31</b>
s.4 / s.4A Public Order Act	0 (0.0%)	3 (60.0%)	2 (40.0%)	0 (0.0%)	<b>5</b>
Witness intimidation	1 (9.1%)	0 (0.0%)	9 (81.8%)	1 (9.1%)	<b>11</b>
Rape Sexual assault	2 (28.6%)	0 (0.0%)	2 (28.6%)	3 (42.8%)	<b>7</b>

<sup>113</sup> The sample contained 65 different offences in total; including them all would be impractical and add little, if anything, to the analysis of the data. Instead, 22 key offences (255 counts) within the offence group which occurred frequently within the sample, or which were particularly serious, were selected.

<sup>114</sup> Where applicable, all offences include the inchoate variants of those offences.

<sup>115</sup> Cases in which counts were left to lie on file are included in these figures, as the outcome (that the charge is not proceeded with) is the same. See 3.9 for further discussion of leaving counts to lie on file.

(victim 16 or over)	3 (75.0%)	0 (0.0%)	0 (0.0%)	1 (25.0%)	<b>4</b>
Sexual assault (victim under 16)	0 (0.0%)	0 (0.0%)	0 (0.0%)	6 (100%)	<b>6</b>
Possessing Class A drug	0 (0.0%)	0 (0.0%)	1 (100%)	0 (0.0%)	<b>1</b>
Possessing Class C drug	4 (66.6%)	0 (0.0%)	2 (33.3%)	0 (0.0%)	<b>6</b>
Possessing Class C drug with intent to supply	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (100%)	<b>1</b>
Arson with intent to endanger life	0 (0.0%)	0 (0.0%)	2 (100%)	0 (0.0%)	<b>2</b>
Reckless arson	0 (0.0%)	2 (100%)	0 (0.0%)	0 (0.0%)	<b>2</b>
Criminal damage	5 (45.4%)	0 (0.0%)	3 (27.3%)	3 (27.3%)	<b>11</b>
Burglary	5 (31.3%)	0 (0.0%)	9 (56.2%)	2 (12.5%)	<b>16</b>
Robbery	4 (15.4%)	0 (0.0%)	19 (73.1%)	3 (11.5%)	<b>26</b>
Theft	7 (16.7%)	10 (23.8%)	8 (19.0%)	17 (40.5%)	<b>42</b>
Handling	1(11.1%)	0 (0.0%)	7 (77.8%)	1 (11.1%)	<b>9</b>
Having offensive weapon / having bladed article in a public place	3 (30.0%)	3 (30.0%)	4 (40.0%)	0 (0.0%)	<b>10</b>
Breach of ASBO	6 (42.9%)	0 (0.0%)	7 (50%)	1 (7.1%)	<b>14</b>

### *Violence*

An analysis of the offences of violence shows that in the most serious assault cases (grievous bodily harm or wounding with intent, s.18 OAPA 1861) there were no guilty pleas, seven counts to which the prosecution offered no evidence, and four effective counts. For s.20 OAPA 1861 offences (grievous bodily harm or wounding), the highest frequencies were equally divided (six counts each) between effective counts and guilty pleas to original counts. In the s.47 OAPA counts the majority were disposed of by guilty pleas to the original counts, but in s.39 assault cases, the majority were disposed of by the prosecution offering no evidence. Counts of both affray and s.4/s.4A of the Public Order Act 1986 most often resulted in guilty pleas which were guilty pleas to those offences as alternative counts. It is notable that a particularly high proportion of the nine counts of witness intimidation (81.8%) resulted in the prosecution offering no evidence.

### *Sexual offences*

Out of the 17 sexual offences in total included in Fig. 4.12, only five resulted in guilty pleas, whereas ten were effective and two (both rapes) were disposed of by the prosecution offering no evidence. This accords with Barrister A and D's views that sexual offences to not tend to crack readily. No sexual assaults were offered as alternative counts.

### *Drug offences*

Eight drug offences in total are included in Fig. 4.12, half of which were guilty pleas to the possession of a Class C drug as original offences. The more serious charges, the possession of a Class A drug, and the possession of a Class C drug with intent to supply were disposed of by the prosecution offering no evidence, and an effective trial respectively.

### *Arson*

As there were only two cases of this nature, it was possible to review the original data and confirm that in both cases, the prosecution offered no evidence on counts of arson with intent to endanger life, and the defendants instead pleaded guilty to reckless arson as an alternative.

### *Theft Act offences*

It is notable that the majority of burglary and robbery offences resulted in the prosecution offering no further evidence, and that almost a quarter of the theft counts are guilty pleas to theft as an alternative offence. This may suggest that, as with the OAPA 1861, the gradation of offences within the Theft Act 1968 lends itself to defendants pleading guilty to lesser charges along the same spectrum of offending.

## **4.9 Pleading guilty to alternative charges, ‘informal’ alternative charges, and leaving counts to lie on file**

In 29 cases (19.2% of the total sample), a defendant pleaded guilty to at least one charge which had been explicitly substituted as a lesser or alternative charge to that which was initially on the indictment (the Judicial and Court Statistics, 2006 show that nationally, this figure was 18% for 2006; the sample therefore appears to be comparable in this respect). In 12 cases (7.9%) the entire indictment was disposed of in this way. During data collection, guilty pleas to lesser or alternative charges were only recorded as such where the file expressly stated that the counts pleaded to were in the alternative.

It became apparent, however, that a more informal means of pleading guilty to lesser to alternative charges was also commonplace. In effect, every case which resulted in at least one guilty plea to an original count, but in which no evidence was offered in respect of other counts, the outcome was in effect the same as in those cases in which a particular count(s) was formally replaced by another. For the defendant, the end result was that he or



she pleaded guilty to fewer offences than were originally on the indictment; and for the prosecution the end result was that they still obtained a conviction in respect of at least one charge. The sample contained 36 cases (23.8% of the total sample) in which there appeared to be a plea of guilty to 'informal' alternative count(s), and eight of these cases also contained a formal substitution of counts on the amendment. Related to this informal pleading to an alternative indictment is the use of leaving counts to lie on file, which has a similar effect to informal alternative counts, in that any counts left on file are not proceeded with, and again, the defendant pleads guilty to fewer charges than were originally on the indictment. It is also possible for an entire indictment to be left on file. When count(s) are left on file, the proceedings are not formally concluded as there is no verdict, but the counts can not be proceeded with, without the leave of the Crown Court or the Court of Appeal. In 23 cases (21.1% of the informal cracked cases), at least one count was disposed of by means of a lie on file.

The four cases summarized below each involved informal alternative charges and/or the use of leaving counts to lie on file:

- Case 42: The two co-defendants initially pleaded not guilty to one count of s.47 OAPA assault and one count of having an offensive weapon each. On the first day of the trial, the prosecution indicated that if both defendants were to plead guilty, they would not proceed with the offensive weapon charge. As a reason for not proceeding with all the charges, the prosecution cited the fact that it had been alleged that the defendants had been friends with the victim, although the file provided no explanation as to how that allegation bore any relationship to the prosecution decision to accept guilty pleas to the s.47 offences and to offer no evidence on the other counts.
- Case 39: The defendant changed his plea to one count of s.47 OAPA 1861 assault to guilty on the first day of his trial, and one count of making threats to kill was left to lie on file.
- Case 77: The defendant pleaded guilty to one count of s.47 OAPA 1861 assault on the second day of his trial, and no evidence was offered in respect of one count of a s.39 CJA 1988 assault which it had been alleged was a part of the same incident.

Case 65: The defendant's indictment originally comprised of two counts of s.47 OAPA 1861 assault, two counts of assaulting a constable, one count of damaging property and one count of attempted s.20 OAPA 1861 assault. A charge of affray was formally added to the indictment as an alternative to the attempted s.20 OAPA 1861 assault, and the defendant pleaded guilty to this count of affray as well as to both s.47 charges. The other counts were all left to lie on file.

#### **4.10 Previous convictions**

The table at Fig. 4.14 below shows how many cracked cases (both informal and recorded) occurred within each range of previous convictions grouping.

Fig. 4.13 Number of previous convictions, by frequency within case outcomes <sup>116</sup>

Number of previous convictions		0	1-9	10-19	20-29	30-39	40-49	50-59	60-69	70-79	80-89	90-99	≥100
Frequency within informal cracked trials		28 (47.5%)	30 (55.6%)	17 (56.7%)	8 (50%)	8 (50%)	3 (60.0%)	2 (50%)	0 (0.0%)	5 (55.6%)	1 (50%)	0 (0%)	1 (33.3%)
Frequency within recorded cracked trials		28 (47.5%)	30 (55.6%)	17 (56.7%)	8 (50%)	8 (50%)	3 (60.0%)	2 (50%)	0 (0.0%)	5 (55.6%)	1 (50%)	0 (0%)	1 (33.3%)
Frequency within effective trials		28 (47.5%)	30 (55.6%)	17 (56.7%)	8 (50%)	8 (50%)	3 (60.0%)	2 (50%)	0 (0.0%)	5 (55.6%)	1 (50%)	0 (0%)	1 (33.3%)
<b>TOTAL (100%)<sup>117</sup></b>		59	30 (55.6%)	17 (56.7%)	8 (50%)	8 (50%)	3 (60.0%)	2 (50%)	0 (0.0%)	5 (55.6%)	1 (50%)	0 (0%)	1 (33.3%)

<sup>116</sup> The record of the defendants' previous conviction was missing from the file in 49 cases; these data are drawn from the remaining 102 cases.

<sup>117</sup> As all recorded cracked cases are also informal cracked cases, the totals are greater than the total number of defendants in that previous convictions group. See Fig 4.13 for a table of the frequency of previous conviction groups.

As Fig. 4.13 shows, the number of previous convictions a defendant had did not appear to be a particularly striking feature of cracked trials, but some of the data presented above do warrant further comment. Notably, the highest percentage of occurrence (with the exception of the 50 – 59 and  $\geq 100$  previous conviction groups, which contained only four and three cases respectively) within the effective trials group was for those cases in which the defendant had no previous convictions. The percentage of cases within the effective trials outcome decreases, although not sequentially, with the number of previous convictions. Within the informal cracked trials, the percentage of cases occurring across the previous conviction groups ranges from 33.3% to 60%, and within the recorded cracked trials, the percentage ranges from 25% to 50%. The percentages of cases falling within the cracked outcomes (both informal and recorded) do, broadly speaking, remain at a similar level or increase as the number of previous convictions rises, but there is no discernable pattern or relationship between the factors.

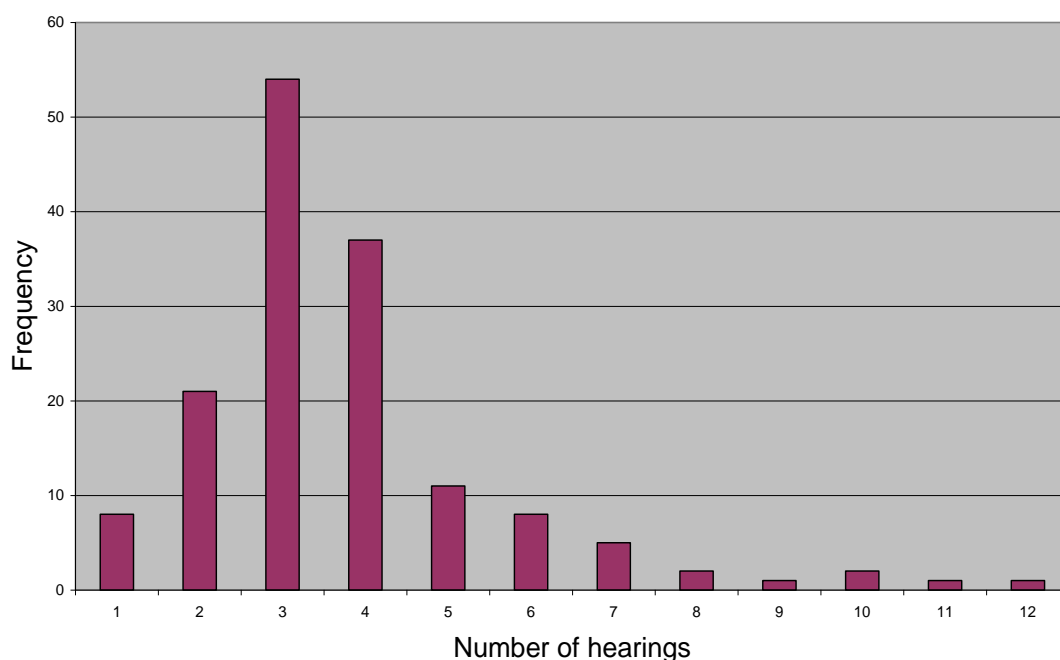
#### **4.11 Number of hearings**

The total number of hearings, from the pre-trial hearing stage to sentencing, was recorded in each case. The number varied quite widely, from eight cases which appeared to involve only one court hearing, to one case which necessitated twelve hearings. The mean number of court hearings was 3.75.<sup>118</sup>

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<sup>118</sup> The number of hearings in each case was determined by taking note of the hearings recorded in the Crown court minute sheet, maintained by CPS case workers and contained in each file. The detail with which the minute sheet was completed varied, at times there was a note on the file to the effect that a hearing had gone ahead without a case worker or other CPS representative available to take notes, and at times parts of it were evidently missing. The actual number of hearings may therefore have on occasion been greater than that which was recorded. The eight cases which involved only one recorded hearing may well fall into this category, as they should not have proceeded to cracked or effective stage without at least one pre-trial hearing and one trial date.

Fig. 4.14 Number of hearings



The representative from the Criminal Defence Service felt that a lack of CPS organisation was a factor in the wastage caused by cracked trials as hearings were too frequently adjourned or vacated as a result of evidential issues which resulted in alternative charges subsequently being offered or accepted at a very late stage when it transpired that the evidential issues in respect of the original charges could not be resolved.

Case 70 was a case at which this criticism could have been levelled. The defendant was originally charged with one s.20 OAPA 1861 assault and one count of damaging property. Following the PCMH there had been an indication that the defendant would make an offer of a guilty plea and the prosecution had indicated that a plea of guilty to the s.20 OAPA assault, with no further action to take place in respect of the other charge, would be acceptable. The minute sheet for the case states that:

‘In light of the Judge’s comments – that he’s reluctant to drag it out any longer – maybe we ought to accept a s.20 [and offer no evidence for the damaging property]’.

This notwithstanding, a trial date was set, but vacated twice as a result of issues with prosecution readiness. On the eventual date of the trial, by which time both key witnesses had indicated a reluctance to give evidence, the defendant canvassed a guilty plea to a lesser, s.47 OAPA assault, which the prosecution accepted.

#### 4.12 Number of counsel

The number of barristers who represented each individual defendant was recorded during data collection, and this data was presented and discussed at section 3.4.5 of Chapter 3.

The table below shows how many informal cracked, recorded cracked, and effective trials occurred, by number of counsel.

Fig. 4.15 Informal and recorded cracked trials by number of counsel

	Number of counsel					
	1	2	3	4	5	6
Informal cracked trial	51 (51.0%)	37 (51.4%)	17 (47.2%)	1 (100%)	3 (50.0%)	0 (0.0%)
Recorded cracked trial	38 (38.0%)	23 (31.9%)	11 (30.6%)	0 (0.0%)	3 (50.0%)	0 (0.0%)
Effective trial	11 (11%)	12 (16.7%)	8 (22.2%)	0 (0.0%)	0 (0.0%)	1 (100%)
TOTAL <sup>119</sup>	100 (100%)	72	36	1	6	1

Contrary to what might have been expected, the percentages within both the informal and recorded cracked trials decrease as the number of counsel involved in the case increases, and the percentages within the effective trial group decrease as the number of counsel increases.

#### 4.13 *Goodyear* indications

*Goodyear* indications were given to only fifteen defendants in the 151 cases. All fifteen of those cases resulted in a plea of guilty to at least one count on the indictment, and eleven of the cases resulted in a plea of guilty to all counts on the indictment (either original counts or alternative counts). In the remaining four cases, one or more cases were disposed

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<sup>119</sup> As all recorded cracked cases are also informal cracked cases, the totals are greater than the total number of cases with that number of counsel. See Fig 3.1 for a table which presents the frequency of different numbers of counsel.

of by the prosecution offering no further evidence, or by counts being left to lie on file.

The table below summarises the circumstances of those cases in which a *Goodyear* indication was given (for the sake of brevity, *Goodyear* indication is abbreviated to ‘GI’, defendant to ‘D’, prosecution to ‘P’, and judge to ‘J’).

Fig. 4.16 *Goodyear* indications

Case No	Original count(s)	Details of <i>Goodyear</i> Indication
11	1. Witness intimidation 2. Damaging property	At trial, D asked for a GI on full P facts. J stated that after a trial, the sentence would be 15 months imprisonment, but if D pleaded guilty, this would be reduced to 12 months.
86	1. Robbery	D asked for a GI on the alternative charge of assisting an offender. J indicated that the sentence would be an 8 month suspended prison sentence with either a curfew or supervision order attached.
87	1. Rape 2. Rape 3. Sexual assault 4. Assault by penetration 5. Assault by penetration 6. Causing to engage in a sexual act without consent 7. False imprisonment	All witnesses attend (unexpectedly) and D requests a GI. J states that he requires a pre sentence report to be carried out first, but that he would give a 15% reduction rather than ‘the usual’ 10%, ‘for sake of AP [aggrieved person]’.
88	1. Affray 2. s.39 CJA 1988 assault 3. Criminal damage	D asked for a GI on the basis of pleading guilty only to the affray (acceptable to P). J indicated the sentence would be non custodial.
89	1. Affray 2. s.47 3. s.39	D asked for a GI on the basis of pleading guilty only to the affray but including the disputed facts that D had concealed a knife and released a Rottweiler onto the victim. J indicated a maximum of an 8 month sentence suspended for 2 years.
82	1. s.47 OAPA 1861 2. Resisting arrest	GI requested on the basis of the s.47 OAPA 1861 only. J indicated a maximum of 12 months imprisonment and subsequently sentenced D to 24 weeks imprisonment suspended for 12 months.
79	1 – 5. s.39 CJA 1988	D sought indication of sentence if he pleaded guilty to all counts other than the s.47 OAPA 1861 assaults. J indicated

	6 – 7. Threats to destroy property 8 – 9. s.47 OAPA 1861 10. Threats to kill	a suspended custodial sentence.
73	1. Affray	D asked at PCMH if P would accept a guilty plea to s.4 Public Order Act 1986. P refused at PCMH but agreed at trial. GI was that the maximum would be a suspended sentence or unpaid work. D sentenced to unpaid work and 6 months community supervision order.
16	1- 3. Breach of ASBO 4. Breach of restraining order	Initial offers from the D of guilty pleas to two counts of breach of ASBO were not accepted. D pleaded guilty to all counts after a GI that would be no addition in sentence to time already spent on remand.
15	1. Affray 2. s.39 CJA 1988 3. Possession of a bladed article	J indicated custody on the basis of one count of affray, although on the basis of plea that D had armed himself as he feared for his safety. (CPS file suggests surprise at the severity of the indicated sentence).
8	1 - 2 Possession of offensive weapon 3. Having a bladed article in a public place	No details on file other than that a GI was requested and given.
3	1. Witness intimidation 2. Breach of ASBO	GI given on the basis of a guilty plea to affray as an alternative to witness intimidation and a guilty plea to the breach of ASBO. Indication was for a maximum of 12 months imprisonment. D was sentenced to a 12 month supervision order and 51 weeks imprisonment suspended for 2 years.
104	1. Threats to kill 2. s.47 OAPA 1861	File states that 'over lunch', P indicated that a guilty plea to s.47 OAPA 1861 would be acceptable, with the threats to kill to lie on file. GI given that the maximum sentence could be non-custodial with a 2 year supervision order. D sentenced to an 18 month supervision order and 120 hours unpaid work.
42a	1. s.47 OAPA 1861 2. Having offensive weapon	J indicated that the sentence would be community punishment and compensation regardless of whether one or both counts were proceeded with. D pleaded guilty to s.47 and P offered no evidence to having an offensive weapon. D sentenced to 80 hours unpaid work and £200 compensation.
42b	1. s.47 OAPA 1861 2. Having offensive weapon	As Case 42a.



As there is no literature yet published on the practical application of *Goodyear* indications, these data provide a valuable insight into the way in which the indications are used and given. One aspect of the *Goodyear* indication which was unexpected was the infrequency with which it was requested.

Two interviewees put forward explanations as to why *Goodyear* indications were not used more frequently:

Barrister A: Modern judges are like traffic wardens, or like very well trained dogs...they used to be mavericks but they don't have any creativity in sentencing anymore and they don't like *Goodyears*. Some say it's not their policy to give *Goodyears* and simply refuse.'

Barrister D: '...very often the judge just hasn't got the time, because a *Goodyear* indication takes about half an hour, and a PCMH takes maybe 15 minutes.'

Other interviewees also made some additional comments on the subject of *Goodyear* indications. Judge A stated that:

'*Goodyears* are very influential...[but] the only people who at trial ask for *Goodyears* are those who are wobbling anyway...'

Judge A also felt that they could be used by defendants in order to play the system, stating that:

'...you don't know how many...would have pleaded anyway and are just trying to get a better deal...'

Barrister D described them as a 'lever' which was used to crack trials but stated that 'they're not meant to crack trials, because the judge really shouldn't be bargaining with the defendant'. Similarly, Judge B's description of *Goodyear* indications as something he liked to use 'to shortcut cases where I can see problems' would suggest that he also viewed them as a tool with which to encourage defendants to plead guilty and crack trials where it appeared

that there were problems with the prosecution case.<sup>120</sup> Judge B did not view this as undue pressure to plead guilty, but Barrister D, when asked whether he thought that the use of the *Goodyear* indication ever creates pressure upon defendants to plead guilty, answered:

‘[Y]es, it does, but the people who ask for *Goodyear* indications are thinking about pleading guilty anyway.’

This comment is telling in its inference that it is legitimate to create a pressure on defendants who are already considering a guilty plea. Judge A’s attitude was similar insofar as he advocated implementing measures to encourage defendants who appeared to be guilty, to plead guilty, and to dissuade them from a trial:

‘We try and actively manage the cases in order to try and stop people just being silly, and saying oh well, I know I was caught in the house...but I just say not guilty...Sometimes, whilst not putting any pressure on the defendant, if I think they’re not being realistic, and they’re not bothering to confront the issues, I’ll put the case back...to the end of the list...or even adjourn it...so they can have a conference, so that I feel they’re really confronting the issues.’

#### **4.14 Basis of plea**

In those cases where a guilty plea was entered on a basis of plea, the nature and circumstances of the basis of plea was recorded. Bases of plea were entered in 17 (11.3% of the total sample) cases, the illustrative details of two of which are summarised below:

Case 82: The defendant faced a s.47 OAPA 1861 assault charge and one count of resisting arrest. Both charges arose from the same incident, in which he had assaulted a police officer whilst resisting arrest. The defendant pleaded guilty to the s.47 assault charge with the basis of plea that he had not realised the person he assaulted was a police officer (which would have been an aggravating factor in sentencing), and had acted recklessly, without intent. It should be noted that it was an undisputed fact that the victim was in police

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<sup>120</sup> It is possible that this is not the meaning Judge B intended; for a judge to offer an inducement to a defendant to plead guilty in order to circumvent a weak prosecution case would be improper, but within the context of the conversation, it was not possible to discern any alternative meanings.

uniform, and that the defendant had seen him step out of a marked police vehicle.

Case 74: The two defendants pleaded guilty to one count each of conspiracy to rob, with one count of handling stolen goods and one count of aggravated vehicle taking each to lie on file. The defendants had been accused of conspiring to rob a Post Office, as they had been apprehended in a stolen car, wearing balaclavas, with a sword, outside a post office, the day pensions were paid out. Their basis of plea was that they had been conspiring to rob an undisclosed business, but that it was not a Post Office.

#### **4.15 Correspondence between facts, evidence and outcome**

Aside from the fact that they involved a basis of plea, what was notable about Cases 82 and 74 (summarised above) in particular, was that the basis of plea seemed at least a little implausible when considered in the light of other (undisputed) evidence. It was a feature of several cases that there appeared to be a lack of correspondence between the alleged facts of the case, the evidence available to support those facts, and the eventual outcome of the case. There were eight cases within the sample where (although clearly a subjective judgement), the eventual outcome lacked correspondence with certain agreed facts of the case.

The relevant details of three of those cases are extracted below:

Case 80: The defendant was charged with two counts of possession of a prohibited firearm, one count of possession of a prohibited firearm with intent to cause fear or violence, three counts of possession of prohibited ammunition, and one count of robbery. The defendant offered to plead guilty to all counts except the two most serious charges (the robbery and the possession of a prohibited firearm with intent), the prosecution accepted this offer, and agreed to offer no evidence on the two outstanding charges. There was, however, what appeared to be reliable evidence against the defendant in relation to the robbery count, in the form of items found in his bedroom which could be linked by DNA and CCTV evidence to the robbery.

- Case 72: The two defendants in this case had initially been charged with one count of aggravated burglary each, and one of the defendants had also been charged with a s.47 OAPA 1861 assault. At the third pre-trial hearing, one count of affray was added to each defendant's indictment, as there had been an indication from the prosecution that, if offered by the defendants, the prosecution would accept guilty pleas to affray and the other counts would be left to lie on file. Aggravated burglary and affray are offences which are fundamentally different in nature and severity, yet affray was effectively offered as an alternative, with the prosecution caveat that the facts of the affray were to include use of a weapon.
- Case 13: The three defendants were charged with one count each of kidnapping, false imprisonment and robbery, but instead offered guilty pleas to affray and taking a vehicle without consent, which were accepted by the prosecution. The two sets of offences again appear to be very different and the essence of this case was that the defendants had approached the victim, who was not known to them, whilst he was sitting in his car, and forced him to drive them home against his will, having threatened him. That element of offence was arguable not reflected in the outcome of the case.

It is clear that in some cases at least, that the effect of a guilty plea being entered to an alternative count, or the functional equivalent of an alternative count as defined by this study, resulted in an eventual outcome which did not strictly reflect the facts agreed at the outset. Barrister D felt that cases being resolved with insufficient regard to the correspondence between the facts and the outcome was more common when the prosecution was represented by a Higher Court Advocate (HCA) (although this did not apply to any of the cases sampled): 'They will accept lesser pleas, or better bases of pleas or whatever, in order to crack it, in order to resolve it sooner, to save costs, than actually sometimes see the appropriate legal or factual basis through to its conclusion.' The barrister felt that HCA's were more driven by cost considerations, and benefitted from being able to make decisions on charge reductions alone, unlike instructed counsel, who had to refer decision back to the CPS.

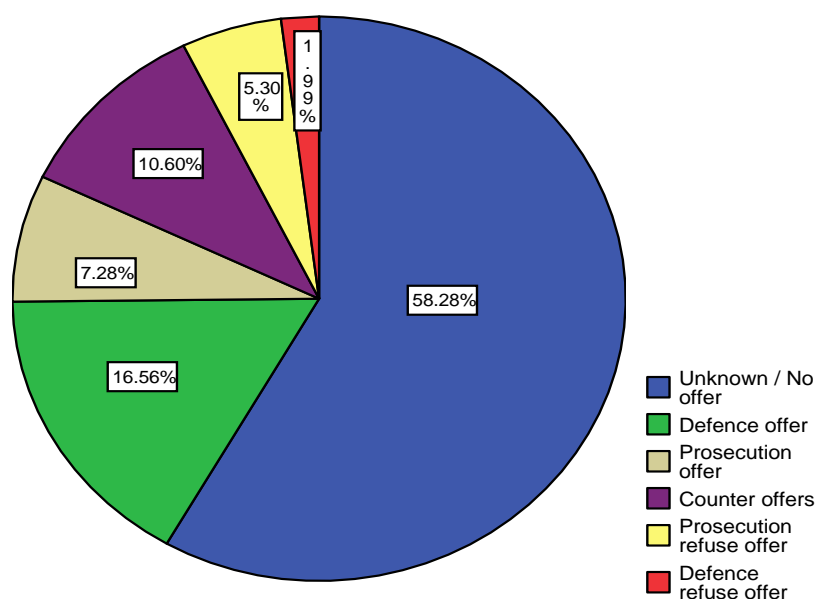
#### 4.16 Offers

It had not been anticipated that prosecution files would provide a great deal of information about the presence or nature of specific offers of guilty pleas, or of indications of the willingness of the prosecution to accept certain offers. It became apparent, however, that the Crown court minute sheets present in each file often recorded the outcome of discussions which led to offers, and that correspondence between defence solicitors and the CPS on occasion made reference to offers to plead guilty to fewer, lesser or alternative charges. In 88 cases (58.3% of the total sample) it was not possible to identify any offers, but in the remaining 63 cases (41.7%) an offer of some kind was made, either by the defence or by the prosecution in respect of at least one count. The types of offers recorded were:

- (i) The defendant offered a guilty plea to one or more offences.
- (ii) The prosecution indicated that they will accept guilty pleas to one or more offences.
- (iii) Counter-offers between defence and prosecutions.
- (iv) An offer was made by the defendant, but refused by the prosecution.
- (v) A willingness to accept a guilty plea was indicated by prosecution, but refused by the defence.

The chart below shows the relative frequencies of the offers recorded:

Fig. 4.17 Classifications of offers



The circumstances of three illustrative cases in which offers were present are extracted below:

Case 40: This was a case in which counter-offers took place. The defendant had been charged with one count of causing grievous bodily harm with intent contrary to s.18 OAPA 1861, and one count of affray. The Crown court minute sheet included the note 'D[efence] indicate G[uilt]y P[leas]s will be offered to s/thing – depends what we want to accept'. The prosecution indicated that they would be willing to accept guilty pleas to s.20 of the OAPA 1861 (reckless grievous bodily harm), and affray; the defendant instead offered a guilty plea to the s.20 assault alone; this was accepted by the prosecution and the affray was left to lie on file.

Case 114: In this case, which involved two defendants who were in a relationship, the first record of an offer came from the defence (although the use of the word 'confirm' might suggest it had been canvassed earlier); a letter from the defendants solicitor stated: 'We would be very grateful if you would confirm that should our client be minded to plead guilty to the offence of burglary that you would not proceed against his co-accused...'

Case 82: The prosecution in this case indicated that a plea of not guilty to a charge of resisting arrest would be acceptable if the defendant pleaded guilty to the other charge of a s.47 OAPA 1861 assault.

Interviews with legal professionals shed further light on their perceptions of the nature and frequency of offers being made:

Solicitor A: ‘...the CPS will not bargain, be prepared to negotiate in every case. Sometimes they’ll say, well I’m sorry, ultimately we don’t want a lesser to this...But if there’s a dialogue to be had, and both parties are prepared to engage in this dialogue, there’s always scope in there, whatever the charge. Either some lesser charge, call it by a different label...or indeed plead guilty to the charge you are charged with, on your terms, on a basis [of plea].’

Judge A: ‘...they [defendants] perceive that there are better offers from the prosecution when the case is in for a trial than there are when the case is in for the PCMH....At the PCMH, the prosecution take a look at the case on paper, and say oh no, we won’t accept that [guilty plea from defendant] and then, as everybody turns up to court, and it becomes apparent to the prosecution that they have one or two little problems...they take the charge which was originally offered by the defence.’

Barrister D referred to local differences in the kinds of offers which would be accepted to particular offences and said that: ‘At the moment, in Bolton for example, there is almost no such thing as a s.18 [OAPA 1861]. Almost without fail they’ll accept a s.20 [OAPA 1861].’

#### **4.17 Ethnicity and case outcomes**

The table below shows the number of recorded and informal cracked trials by ethnicity, as well as the number of cases in which there was at least one guilty plea.

Fig. 4.18 Ethnicity, cracked trials and guilty pleas

Ethnicity	Recorded cracked trials (%)	Informal cracked trials (%)	Effective trials (%)	Total <sup>121</sup>
White European	64 (34.6%)	96 (51.9%)	25 (13.5%)	185 (100%)
Dark European	0 (0.0%)	0 (0.0%)	1 (100%)	1 (100%)
Afro-Caribbean	0 (0.0%)	1 (20.0%)	4 (80.0%)	5 (100%)
Asian	4 (33.3%)	5 (41.7%)	3 (25.0%)	12 (100%)
Arab	2 (40.0%)	2 (40.0%)	1 (20.0%)	5 (100%)
Unknown	5 (45.5%)	5 (45.5%)	1 (9.0%)	11 (100%)

The data show that the percentage of effective trials was lowest for white European (13.5%) and defendants whose ethnicity was unknown (9%). This is in contrast with a very high effective trial rate of 80% for Afro-Caribbean defendants, 25% for Asians, and 20% for Arab defendants. Recorded cracked trial rates were between 33.3% and 45.5% for each ethnicity, except Afro-Caribbeans and dark Europeans, who had no recorded cracked trials (although there was only one dark European defendant in the sample). Informal cracked trials rates ranged from just 20% of the sample set out in the table above (Afro-Caribbeans) to 51.9% of the white Europeans.

<sup>121</sup> Totals do not equate to the total number of cases defendants of that ethnicity were involved in, as some cases were both informal and recorded cases.



Fig. 4.19 below sets out the types of offer identifiable within the sample (including *Goodyear* indications, by ethnicity).

Fig. 4.19 Offers and *Goodyear* indications, by ethnicity.

Ethnicity	No offer (%)	Defence offer (%)	Prosecution offer (%)	Counter-offer (%)	<i>Goodyear</i> indication (%)	Total <sup>122</sup>
White European	76 (55.5%)	24 (17.5%)	9 (6.6%)	14 (10.2%)	14 (10.2%)	137 (100%)
Dark European	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (50.0%)	1 (50.0%)	2 (100%)
Afro-Caribbean	4 (80.0%)	0 (0.0%)	1 (20.0%)	0 (0.0%)	0 (0.0%)	5 (100%)
Asian	6 (85.7%)	0 (0.0%)	0 (0.0%)	1 (14.3%)	0 (0.0%)	7 (100%)
Arab	2 (66.7%)	0 (0.0%)	1 (33.3%)	0 (0.0%)	0 (0.0%)	3 (100%)
Unknown	1 (50.0%)	1 (50.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	2 (100%)

The data presented above shows that by far the majority of offers were made in cases in which the defendant was recorded as being white European, and only one of the *Goodyear* indications in the sample involved a non-white European defendant, and this was a defendant recorded as being ‘dark European’. Similarly, in all but one case (in which the defendant’s ethnicity was unknown) offers originating from the defence involved white European defendants. The percentage of cases in which no offers were made was only 55.5% in the white European category, compared with 80% for Afro-Caribbeans, 85.7% for Asians and 66.7% for Arab defendants (although the very small number of cases falling within those categories could skew the results significantly).

#### 4.18 Conclusions

This chapter has presented several key quantitative findings which, it is submitted, have contributed to the existing data on cracked trials, and on the scope for plea bargaining to be a feature of cracked trials. Firstly, a distinction between informal and recorded cracked

<sup>122</sup> Totals do not equate to the total number of defendants of each ethnicity, as *Goodyear* indications could be present alongside other offers, and only offers, not refusals, have been included in the table for the sake of clarity.

cases has been put forward; the data have demonstrated that if cracked *counts* (informal) rather than entire cracked trials (recorded) are considered, 72.2% of the sample were cases which could be defined as cracked cases. This means that the scope for plea bargaining can be conceived of more broadly; it is not necessary for a trial to crack in its entirety for it to involve a plea bargain. The data presented have also challenged the prevailing assumption that cracked trials can be attributed solely to defendants' late guilty pleas in the majority of cases. If reasons for individual counts cracking were taken into account, thus allowing a case to have multiple reasons for cracking, then only 21 cases (28% of the recorded cracked trials) cracked because the defendant pleaded guilty to all original counts (compared with a figure of 64% in the Judicial and Court Statistics 2006). An analysis of outcomes by offences has suggested that anecdotal evidence regarding certain types of offence where there is a structured gradation of offences being more likely to crack and result in alternative charges, may be accurate, and that interviewees' opinions that sexual offences were least likely to crack was also largely true of the cases sampled. The data on race and cracked trial outcomes and offers adds to the data on ethnic minorities and plea bargaining.

This chapter has also set out data on the means by which in which the functional equivalents of guilty pleas to alternative charges are created within cases where some counts, but not others, are proceeded with. The data has also contributed to the knowledge of the range and prevalence of offers between prosecution and defence, and to what is known of the operation of *Goodyear* indications.

The following chapter of this thesis builds on the data presented here, by providing an analysis and interpretation of the data collected, as well as considering its wider implications for cracked trials, plea bargaining and wider criminal justice policy.

## **CHAPTER 5**

### **CONCEPTUALISING THE ROLE OF PLEA BARGAINING IN CRACKED TRIALS**

#### **5.1 Introduction**

This chapter analyses and interprets the results presented in the previous chapter, and develops the issues raised throughout the thesis thus far in order to conceptualise the role of plea bargaining in cracked trials, and to consider the consequences of the way in which the practice operates in England and Wales. The chapter begins by considering the way in which cracked trials are currently defined by administrative statistics and draws on the distinction made by this study between informal and recorded cracked trials in order to analyse the wide ranging implications of this definition. The proportion of cracked trials within the sample in which plea bargaining appears to have taken place is quantified, and the issue of whether cracked trials are ‘caused’ primarily by the defence is considered. Features of cracked trials highlighted by the results are explored in the light of their relationship to forms of plea bargaining and when analysing the different types of plea bargain present within the sample, an evaluation is made as to whether the presence of the practice led to pressures to plead guilty, or whether it allowed defendants to play the system. This allows the nature of plea bargaining within the sample to be outlined within a broad framework, and to consider whether conclusions can be drawn about the overall effect of the practice on defendants’ late guilty pleas and cracked trials. It is argued that neither the policy criticism that cracked trials are indicative of defendants playing the system, nor academic concerns that they are the effect of pressure to plead guilty are entirely appropriate, and that alternative conceptualisations of plea bargaining warrant consideration. Chapter 5 therefore concludes by considering whether plea bargaining has the potential to operate as a mutual exchange of consensual or contractual concessions which do not necessarily operate coercively, nor allow the defendant to play the system, and that whilst taken to extremes, ‘bazaar style’ justice (a term used initially by McDonald (1979)) may be undesirable, some departure from adversarialism (or at least acknowledgement thereof) may be inevitable.

## 5.2 Defining cracked trials: recorded and informal cracked trials

As the results presented at Fig. 4.6 of Chapter 4 demonstrate, the number of cases in which at least one, but not all, counts on the indictment cracked was considerable (109 cases out of a sample of 151; 72.2%). In this light, it becomes clear that the current definition of a cracked trial is in itself problematic. From an administrative perspective, a case in which only one count cracks, even if others are tried, still entails the wasted preparation, overestimated court and court staff time, and possible distress to witnesses that is associated with cases in which all counts crack, yet only the latter is deemed to be a cracked trial. With reference to late guilty pleas causing trials to crack, one late guilty plea together with other outcomes within a case is no less interesting in terms of the likelihood that it was a plea bargain than a case which is disposed of entirely by way of guilty pleas. As a cracked trial is defined in part as a case which ‘requires no further trial time....’ (Judicial Statistics 2006, p.103), an informal cracked case in which at least one, but not all counts, crack will require further trial time and it will not be a cracked trial as defined by existing administrative statistics. The effect of this is that a potentially considerable number of cases nationally are recorded as effective, despite including one or more individual cracked counts. The resulting statistics therefore underestimate the prevalence of individual late guilty pleas and prosecution decisions to offer no evidence; the fact that almost three quarters of this study’s sample are comprised of informal cracked cases suggests that the ‘problem’ of the cracked trial may be broader than is generally acknowledged.

The difference between the two figures may not be of overwhelming interest to the administration of the criminal justice system, as where the entire case does not crack, there is less inconvenience in terms of wastage of court time and cost. Depending on the nature of the offences this could, however, vary considerably; particularly if it is the most serious charges which are not proceeded with, as a large proportion of any trial preparation will then have been wasted, and some witnesses may no longer be required. The significance of these hidden cracked outcomes is not restricted to highlighting a need for improved administrative record keeping though. Every individual cracked count is one late decision to plead guilty, or one decision by the prosecution to offer no evidence. The fact that the same decision making processes may not be applied by defendants or their lawyers to each count does not make cases with mixed outcomes any less worthy of attention; in fact it may be those cases in which some counts are disposed of by way of guilty pleas and others by trial or by the prosecution offering no evidence that are of particular interest. This is

because any charge bargains would invariably fall either within this group of cases or within those cases in which the defendant pleads guilty to alternative offences.

Having analysed case outcomes on an individual count basis has therefore revealed that cracked counts were an even more prevalent feature of Manchester Minshull Street Crown court than the existing data would suggest, and that the potential for plea bargaining was therefore also greater and more varied in its dynamics.

### **5.3 Cracked trials: ‘the stick to beat the defence Bar with’?**

As discussed at Chapter 1.2, cracked trials have generally been regarded as a problem for which the defendant and / or the defence lawyer can be blamed, and taken on face value, this view is supported by statistics: the 2006 Judicial Statistics record that 64% of cracked trials that year were caused by defendants’ late guilty pleas, 18% by the prosecution offering no evidence, and 16% by defendants pleading guilty to alternative charges. This equates to 80% of cracked trials which can ostensibly be attributed to defendants’ decisions and it is little wonder that Barrister D described cracked trials as having been ‘the stick to beat the defence Bar with’ (quoted above at 3.3). However, Figs. 4.7 (official statistics) and 4.8 (this study’s findings) demonstrate that when cases are analysed more closely and multiple reasons for trials cracking are accounted for, a very different picture emerges than the one put forward by official statistics and relied upon by policy makers. Fig. 4.8 shows that a defendant pleading guilty to the original charges was the only reason for the trial cracking in just 28% of the sample, and pleading guilty to alternative charges was the only reason in 16% of the sample; resulting in 44% of the sample being attributable to defence reasons, rather than the 80% of the official statistics.

It is primarily the emphasis which is placed on the considerable proportion of cases (28% of the recorded cracked cases, see Fig. 4.8) with combination reasons for cracking which separates the prevailing administrative designation of cracked cases from one which may be more revealing about the true nature of cracked trials. Existing statistics are founded on recording practices which record any case in which there is at least one guilty plea as a case which has cracked as a result of the defendant pleading guilty, when in fact this outcome may have been one of many reasons, and the prosecution may have offered no evidence in respect of other counts. The resulting statistics are therefore flawed as in neglecting to take account of cases with multiple outcomes, they fail to represent a full picture of the nature

of cracked cases, and as such are of less value to the courts in achieving their aim of attempting to reduce the number of cracked trials. If for example a trial cracks following one guilty plea to a lesser offence than that which was originally charged on the indictment, and no evidence was offered by the prosecution in respect of a further two counts, then there is little logic in deeming it to be a cracked trial caused solely by a defendant's late guilty plea. Doing so simply perpetuates the view that defendants or defence lawyers cause cracked trials, and adds nothing to the understanding of the causes of cracked trials.

If (as in this study) cases are examined more closely to explore the variety of reasons for counts within trials cracking, then a fuller picture of the cracked trial emerges. If the findings of this study were to be representative of cracked cases more widely (and as demonstrated at Chapter 4.2 above, the sample has features which suggest it may be similar in nature to the case load at Minshull Street Crown Court), then trials which crack for a combination of reasons would be as common as those which crack as a result of the defendant pleading guilty to the original indictment, or the prosecution offering no evidence; yet the prevalence of combination cases has been overlooked to date. This has a direct bearing on charge bargaining, because, as stated above, cases in which there are a combination of guilty pleas and the prosecution offering no evidence may be those in which charge negotiations are more likely to have occurred (see 5.5.4 for a more detailed discussion of the presence of charge bargaining within the sample). It is indicative of a degree of hypocrisy in the way statistics on cracked trials are recorded and presented that a cracked trial is only deemed such when *all* counts within the case crack, yet the reason for the trial cracking is the defendant's guilty plea when just *one* count cracks for this reason. The combined effect of this is that the total number of cases featuring cracked counts is vastly underestimated, but also that the proportion of cracked trials caused by defendants pleading guilty at a late stage is overrepresented and contributes to the myth that defendants manipulating the system for their own benefit is a widespread phenomenon.

#### **5.4 The extent of plea bargaining as a cause of cracked trials**

As stated at Chapter 4.3, in 35 cases within the sample (23.2%), each individual count within the case was effective. This leaves 76.7% of the sample in which at least one count cracked (the informal cracked cases). The entire trial (recorded cracked cases) cracked in 49.6% of the sample. Having established that defence reasons for cracked trials were considerably less frequent within the sample than cruder official statistics would have

suggested, this section of Chapter 5 analyses the reasons for these cracked counts and cases more closely in order to put forward an estimation of the prevalence of plea bargaining within the cracked cases; in doing so it provides the basis for the conceptualisation of plea bargaining within the sample.

Of the informal cracked cases, 5 (4.6%) comprised of a combination of effective counts and the prosecution offering no evidence in respect of other counts and 21 (19.3%) cracked solely (and were therefore also recorded cracked cases) as a result of the prosecution offering no evidence. It is beyond the scope of this thesis to examine decisions to drop prosecutions more closely but it is clear that where each count within a case either resulted in the prosecution offering no evidence, or was effective, and therefore no guilty pleas were entered, plea bargaining is unlikely to have played any role in the final outcome. It is possible that some decisions to offer no evidence could have been related to the acceptance of guilty pleas in respect of the same defendant's charges in another trial, but no evidence of this was present within the cases sampled. Similarly, decisions to offer no evidence in respect of one defendant's charges may have been made in response to a co-defendant's guilty pleas. There was evidence of this being true of one case within the sample, Case 114.

If the number of cases which were entirely effective (35), and those whose cracked counts were a result solely of the prosecution offering no evidence or leaving counts to lie on file (26)<sup>123</sup> are deducted from the total sample of cases against defendants (151), this leaves 90 cases (59.6% of the total sample) in which there was at least one guilty plea. This group of cases are those in which some form of plea bargaining can be said to have taken place. It is these cases which are considered below, as the thesis moves on to consider the types of plea bargaining present within the sample.

## **5.5 Forms of plea bargaining identified within the sample**

As stated earlier in this thesis, the definition of plea bargaining adopted by this study is that any guilty plea which a defendant believes will give rise to benefits or concessions which flow from the prosecuting authorities or the government to the defendant, directly or indirectly, is the result of a plea bargain, and it is with this in mind that the discussion of

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<sup>123</sup> See 5.5.4 for further explanation of the reasons for treating the two types of disposition alike. Three cases were disposed of by all counts being left to lie on file, and two cases were disposed of by a combination of counts being left to lie on file and the prosecution offering no evidence.

forms of plea bargaining which follows should be read. The data presented in this thesis support the broad consensus within the academic literature that plea bargaining falls into four predominant types: 'straightforward' plea bargaining, sentence bargaining, fact bargaining and charge bargaining. 'Straightforward' plea bargains are those in which there is no bargain as to the charge or the facts, but the defendant pleads guilty in the expectation of a lesser sentence (Ashworth and Redmayne 2005, p. 275). Given, however, that it is the expectation of a lesser *sentence* which motivates this type of bargain, they are described hereinafter as 'sentence bargains' brought about by the sentence discount. The distinction is primarily semantic; it is not argued that this type of bargain operates in a way which is any different from the practice previously described by Ashworth or others, but it is submitted that it is more clearly defined when referred to as a form of sentence bargain as it is the sentence which is subject to the 'bargain' (see 5.5.1 below). *Goodyear* indications were seen to operate as an alternative form of sentence bargaining, formalised to a degree, which were infrequent but did occur in fifteen cases within the sample (see (5.5.2 below). The use of a basis of plea was a feature which occurred with relative frequency within the cases sampled (in 15.6% of the informal cracked cases) and, it is argued, represents a formalised fact bargain (see 5.5.3 below). Charge bargains, however, were by far the most common form of plea bargain found within the sample, and evidence of their use was present in 57 cases in total (52.3% of the informal cracked cases). It is argued that charge bargains occurred in those cases where pleas of guilty were offered to alternative offences formally, and also in cases in which the defendant pleaded guilty to some of the original counts and the prosecution offered no evidence (or left counts to lie on file) in respect of other original counts on the indictment (see 5.5.4 below).

#### 5.5.1 Sentence bargains: the sentence discount

In 21 cases within the sample (28% of the recorded cracked cases), the entire case was disposed of by guilty pleas to all original counts on the indictment, without any other apparent concessions from the state featuring within the case (Fig. 4.8). In these 21 cases, there was no reduction or other change to the charges, the facts were not presented differently (at least not with the aid of a basis of plea), there was no recorded indication of the maximum sentence which would be imposed, and there appeared to be no relationship between the defendant's guilty plea and the outcome of another case against the same, or another, defendant. These cases are therefore those which appear to have had no discernable evidence of plea bargaining other than the defendant's late decision to plead



guilty, and the existence of the sentence discount. If implicit bargains are incorporated into our understanding of plea bargaining, as they are by the majority of writers, and by the definition adopted by this study, then these 21 cases are plea bargains regardless of the absence of other features. It may be that in some of these cases, other, more personal or specific factors induced the defendant to plead guilty, but he will nonetheless have been entering into a plea bargain by receiving a benefit from the state in exchange for his guilty plea.<sup>124</sup>

Furthermore, it is argued that upon closer examination, the sentence discount variant of plea bargain is not as implicit as might be assumed. Unlike jurisdictions in which a guilty plea may merely attract an informal expectation of leniency, in England and Wales the sentence discount is formalised on a statutory basis by s.144 of the Criminal Justice Act 2003, and further clarified by the 2007 SGC Guideline. When a defendant pleads guilty, he exchanges that guilty plea not just for a tacit expectation of leniency, but for the strong expectation that his sentence will be reduced by a certain degree, dependent on the timing of his plea. A potential flaw in this argument is that it fails to take into account the complication that sentencing, as well as discounting, can be inconsistent, and there is no way of ensuring that a defendant does in fact receive a discount; the judge can impose the sentence which would have in any case been imposed following conviction, and simply state that he had been minded to impose an even higher sentence. There have, however, been recent Court of Appeal decisions which have emphasised the importance of the sentencer stating explicitly that a discount has been given, when given, in order to ensure transparency.<sup>125</sup> Furthermore, the fact remains that most judges do at least appear to give credit for guilty pleas (see Baldwin and McConville 1978; Moxon 1988; Hood 1992) and the sentence discount is a firmly entrenched feature of sentencing in the Crown court. It should be noted, however, that Henham (1999, p.527) found that over one third of judges considered a guilty plea to be either not important at all or not particularly important. The effect of the 2007 SGC Guideline remains to be seen; the application of discounts may become more consistent (if not more equitable) with a framework in place. Baldwin and McConville (1978) and Moxon (1988) both found that defendants tended to be given greater sentence discounts for last minute guilty pleas; although the principle has always (even pre-SGC Guidelines) been that defendants should be given the most credit for *early*

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<sup>124</sup> Bottoms and McClean, for example, who found that 10% of the defendants they surveyed pleaded guilty because they wanted to 'get it over with' (1976, p.112).

<sup>125</sup> See for example *Shane Tony P* [2004] EWCA Crim 287 and *Aroride* [1999] 2 Cr App R (S) 406.

guilty pleas. These factors notwithstanding, the formalised nature of the sentence discount means that a guilty plea entered in the knowledge of the discount is an explicit bargain, rather than one which is predominantly tacit in nature. From a plea bargaining perspective, the important issue is not necessarily whether a particular discount was applied, but whether the defendant *perceived* that he would receive the benefit of a reduced sentence in exchange for a guilty plea and the possibility that sentencers may, unbeknown to the defendant, not always give a discount does little to lessen the explicit nature of the sentence discount.

### 5.5.2 Sentence bargains: *Goodyear* indications

*Goodyear* indications, like the sentence discount, result in a formally regulated and explicit exchange of concessions between a defendant and the state. The sentence discount gives a defendant the legitimate expectation that he is exchanging a guilty plea for a reduced sentence, but the *Goodyear* indication takes this one step further and allows the defendant to enter a guilty plea in the knowledge that the sentence imposed will not exceed a specified maximum. Although the Court of Appeal stated in *Goodyear* that the judge should never be invited to give an indication on the basis of what would appear to be a plea bargain, some commentators have viewed the introduction of *Goodyear* indications as the formalisation of plea bargaining (Darbyshire 2005, p.284; Sanders and Young 2007, p.404; Vogel 2008).

*Goodyear* indications were given in only fifteen of the cases sampled (13.8% of the informal cracked cases), and in each case the defendant subsequently entered a guilty plea to one or more offences (see Fig. 4.16). Barristers A and D, Judge A and Solicitor A also felt that in their experience *Goodyear* indications were given infrequently, which suggests that the cases sampled may not be unrepresentative. It may be the formalised nature of the arrangement, and the fact that the exchange is between the defendant and the state rather than the defendant and the prosecution, which results in its infrequent use. To date, there appears to be no other empirical data available on the use of *Goodyear* indications; the data presented by this thesis therefore address important questions about the implementation and nature of sentence indications. A *Goodyear* indication requires more procedure and accountability than, for example, a charge bargain which can be struck relatively informally and swiftly between opposing counsel. The increased certainty which accompanies it makes the *Goodyear* indication a powerful form of plea bargaining. As the indication is binding and enforceable, a defendant can plead guilty in the knowledge that his sentence will not exceed the maximum indication and it was made very clear in the recent case of *McDonald* that a

*Goodyear* indication was binding, even in a situation in which the judge had erroneously overridden a statutory requirement to impose an indeterminate sentence for public protection.<sup>126</sup> This makes a guilty plea following a *Goodyear* indication an attractive proposition for a defendant as, unlike charge or fact bargains which can give rise to the expectation of a lesser sentence, but will still result in an unknown sentence, the *Goodyear* indication gives a defendant the security to enter a guilty plea in the knowledge that there is no risk inherent in the outcome. For a defendant who is guilty, or for a defendant who is not legally guilty but believes there is an unacceptably high risk of conviction and a more severe sentence, the elimination of that risk in exchange for a guilty plea may be a rationally calculated choice for a defendant to make.<sup>127</sup>

Three of those interviewed (Barrister B, Barrister D and Judge A) felt that defendants who requested *Goodyear* indications were generally those who were intending to plead guilty in any case. If this is the case, the request for a *Goodyear* indication could be seen as additional security for defendants to ensure that they will receive a sentence discount which they consider to be an acceptable exchange for their guilty plea and the loss of their chance of acquittal. The fact that each of the fifteen defendants in the sample who requested a sentence indication pleaded guilty as a result could suggest that they were intending to plead guilty in any case, particularly when one considers the non-specific terms of some of the indications given. It is notable from an examination of the *Goodyear* indications within this study's sample that in only a minority of cases were judges specific in the sentence indication they provided, in most, only a vague indication was given.

One case in which a very specific indication was given was Case 11, in which the judge breached the *Goodyear* guidelines by presenting the defendant with two alternative sentences. He stated that the defendant would receive a 12 month custodial sentence

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<sup>126</sup> [2007] Crim LR 737

<sup>127</sup> This of course relies on that risk of conviction being real, and not a risk deliberately overestimated by a defence barrister in order to encourage a guilty plea. See Sanders and Young (2007), pp.425 - 428 for a comprehensive discussion of the importance of estimates of the likelihood of conviction. It is extremely difficult, if not impossible, for even the most experienced of defendants to be able to accurately estimate their risk of conviction and establish how good an offer a particular sentence indication may be. That assessment will be based largely on the defendant's barrister's view of the indication, as conveyed to the defendant, and will also be influenced by the extent to which the defendant is risk averse. There was no evidence within the cases sampled that the defence barrister under- or over-estimated the risk of conviction in advice to the defendant, but it is highly unlikely that evidence thereof would be contained within the prosecution file.

following a guilty plea, or a 15 month sentence following conviction at trial.<sup>128</sup> The defendants in Cases 89 and 86 were both given relatively precise indications (eight months imprisonment suspended for two years in Case 89, and eight months imprisonment suspended for two years with either a curfew or supervision order attached in Case 86). These indications are in contrast with the majority, which were generally less precise, such as that the sentence would be non-custodial (Case 88), that it would be custodial (Case 15), that the sentence would be suspended (Case 79), or that the punishment would be a community sentence and compensation regardless of whether one or both counts involved were proceeded with (Case 42). Also notable was the fact that in some cases, there was considerable disparity between the maximum sentence indication given and the sentence subsequently imposed. For example in Case 3, the maximum sentence indicated was 12 months imprisonment and the sentence imposed was a suspended prison sentence and a supervision order. Similarly, in Case 82 the indication was of a maximum sentence of 12 months imprisonment and a 6 month sentence, suspended for 12 months was imposed (see Fig. 4.16).

If such differences between the specificity of *Goodyear* indications given, and between the maximum sentence indicated and the sentence ultimately imposed are commonplace, then a *Goodyear* indication provides the defendant with less useful information than may have been supposed. A defendant has no way of knowing how accurately his *Goodyear* indication reflects the actual sentence to be imposed and trading the risk of conviction for the certainty of a more lenient sentence becomes a less attractive proposition if that certainty is not so certain after all. Some judges may overestimate the likely sentence, wary of the possibility of the pre sentence report revealing information which would have warranted a higher sentence (in only one of the fifteen cases - Case 87 - in which a sentence indication was requested did the judge state that he would need to see a pre-sentence report before giving a firm indication; he did however indicate that he would apply a 15% reduction to whatever the sentence would have been upon conviction following a trial). In light of the fact that *Goodyear* indications may not be a close reflection of the sentence to actually be imposed, the defendant is reliant on the barrister to advise on how good a 'deal' an indication might be. Since *Goodyear* indications appear to be used relatively infrequently and were only introduced in 2005, it may be that even barristers have yet to have sufficient

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<sup>128</sup> Similarly, in A-G's Reference (No. 80 of 2005) the trial judge had told the defendant that he would face a long prison term upon conviction after trial but that a guilty plea would result in a non-custodial sentence. The Court of Appeal criticised the trial judge and restated that a judge should not give anything other than an indication of what the maximum sentence would be following a guilty plea.

experience of different judges' approaches to giving *Goodyear* indications to be able to advise their client more fully. Moreover, in this study's sample at least, defendants did not appear to be deterred from pleading guilty on the basis of vague sentence indications and it may be that even a vague maximum sentence is sufficient inducement to plead guilty and even a vague indication may put an anxious defendant's mind at rest that he will not serve a long prison sentence, or will receive a non-custodial sentence.

Sentence bargains as provided for by *Goodyear* indications are the one type of plea bargain which even some critics have acknowledged has a saving grace; that of adding transparency to the system and bringing plea bargaining into the open (see for example Darbyshire 2006; Sanders and Young 2007). It was, however, the type of bargain used the least frequently within the sample (perhaps as a result of the formalities involved), and even when a sentence indication was given, it was often vague or was considerably higher than the sentence later imposed. The system may therefore be transparent in the sense that it takes place in open court, and the indication is enforceable, but the results of this study suggest that it does not appear to provide the associated certainty of outcome to defendants which might have been hoped for.

### 5.5.3 Fact bargains

The fact bargains (Darbyshire 2000) within the sample were primarily those involving a basis of plea; a written record of the agreed facts to which the defendant agrees to enter a guilty plea, present in 17 cases within the sample (Fig 4.14). As was expected, bases of plea were used to lessen the severity of the facts of offences, presumably in the hope that sentencing would be more lenient if aggravating factors could be expressly denied, or mitigating facts put forward. This is a clear form of plea bargain in which a defendant enters a guilty plea in exchange for the offence (even if it is the offence originally charged) being presented in a less serious way, and this is a clear benefit which flows from the prosecution to the defendant.

In *Beswick* [1996], the Court of Appeal held that the prosecution should not agree to a basis of plea on a set of facts which are known not to reflect the true facts.<sup>129</sup> However, as the data presented at 4.14 and 4.15 show, it was apparent that there were several cases within the sample in which a basis of plea resulted in an agreed set of facts which appeared at the

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<sup>129</sup> 1 Cr App Rep (S) 343.

very least to be unrealistic and there was a lack of correspondence between the facts, evidence and eventual outcome. Wright and Miller describe plea bargaining as ‘dishonest’ for this reason; the eventual outcome matches neither the original charges nor the offender’s behaviour (2002, p.33).

Although the effect of a fact bargain is less certain than that of the sentence discount or a *Goodyear* indication, as it may just reduce the severity of the offence by a small degree, it is nonetheless another benefit in exchange for a guilty plea which is explicit in nature, as the agreed facts form a written basis of plea and it is upon these facts that the defendant is sentenced. As *Goodyear* indications may only be requested where the prosecution and defence are agreed on the factual basis for the guilty plea, it may be that fact bargains become an increasingly common feature of cracked trials.

#### 5.5.4 Charge bargains

A charge bargain takes place when a defendant pleads guilty in exchange for some prosecutorial concession as to the number or severity of charges; the quantitative findings of this study demonstrate that charge bargains were a common feature of the cracked cases within the sample, and that there were several ways in which charge bargains could be created. The most straightforward, ‘classic’ charge bargains occurred when a defendant pleaded guilty to alternative charges on an expressly amended indictment; this occurred in respect of at least one charge in 29 cases (19.2% of the total sample), and entire indictment was disposed of by formal alternative charges in 12 cases (7.9%). The clear benefit which flows to the defendant in exchange for his guilty plea is the reduced charge, which in addition to resulting in a less serious charge on his criminal record, is also likely to lead to a lesser sentence than that which would have been imposed (even following a guilty plea) for the original charge.

In addition to these cases, however, an analysis of the data shows that there were many instances in which a more informal equivalent of pleading guilty to alternative charges was used, and there were 36 cases (23.8%) in which there was at least one guilty plea to an original count, but no evidence offered in respect of other counts. It is argued that, as the outcome was that the defendant pleaded guilty to an alternative, lesser indictment, the effect was the same as that of a ‘classic’ charge bargain, but that an awareness of the distinction to be made between the two types of cases allows for a greater understanding of

the varied dynamics of charge bargaining, and an acknowledgement that charge bargains are not necessarily only the result of amended indictments with officially recorded alternative charges.<sup>130</sup>

Informal charge bargains of the nature described above were further supplemented by cases in which some counts were left to lie on file (this applied to at least one count in 23 cases – 21.1%), which, it is argued, is a functional equivalent of the prosecution offering no evidence. Historically, the purpose of the prosecution's discretion to leave cases to lie on file was to allow for the potential future reinstatement of the charge in the prosecution of offenders as repeat offenders, or if the defence launched a successful appeal against other offences for which the defendant had been convicted (Pattenden 1990). A charge left to lie on file can, in theory, be reinstated by the prosecution, but only with leave of the trial judge or the Court of Appeal, and it is a relatively rare occurrence, so the effect for a defendant is that the prosecution does not put a case forward on that charge and the defendant does not receive a penalty for the offence. The current CPS guidance on the use of leaving cases to lie on file suggests that it may be useful in the following circumstances:

- (i) where the defendant has pleaded guilty or has been convicted of other counts in the same indictment;
- (ii) the defendant has pleaded guilty or has been convicted on counts on another indictment; and
- (iii) continuation of proceedings on remaining matters is no longer needed in the public interest.<sup>131</sup>

It is therefore a flexible means by which the CPS is able to effectively offer no evidence in respect of a charge, but without it being recorded as a prosecution 'crack'. From the data extracted for this study, it was not apparent on what basis the CPS made decisions to leave cases to lie on file or to offer no evidence, and prosecution decision making is in any case beyond the scope of this study. What was clear, however, was that a great many cases within the sample were disposed of by an outcome which was difficult to discern from cases in which alternative counts were formally added, and that the three disposition types discussed in this section each resulted in charge bargains.

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<sup>130</sup> The only difference in the practical effects of informal charge bargains and pleading guilty to alternative charges in a more formal sense, was that the latter could perhaps more explicitly acknowledge that a particular offence was more appropriate to the facts as the defence and prosecution agreed them to be at court.

<sup>131</sup> Available at: [www.cps.gov.uk/legal/section3/chapter\\_f.html#\\_Toc44573540](http://www.cps.gov.uk/legal/section3/chapter_f.html#_Toc44573540).

Data were collected on the sources of offers in the 63 cases (41.7%) in which it was possible to identify a specific offer, to vary the terms of the indictment in some way (including the addition of a basis of plea) or to accept / offer guilty pleas to informal alternative charges (Fig. 4.16), and this allows for further analysis of the dynamic of charge bargains within the sample. In 16.6% of cases, the defence initiated the offer, compared with 7.3% of cases in which the prosecution initiated the offer, and in 10.6% of all cases, there were counter offers between the parties. This shows firstly that charge bargains were commonplace, but moreover that the bargaining dynamics were varied and it was not necessarily the case that offers were made from the prosecution to the defence. The data derived from interviews with legal professionals also showed that those interviewed believed that offers and negotiation regarding the charge were commonplace and a routine part of criminal procedure.

As charge bargaining was so widespread, it is important to consider the factors which, in combination, may explain the criminal justice system's reliance on the practice. Firstly, the Code for Crown Prosecutors provides considerable flexibility in allowing prosecutors to choose to proceed with the charges they consider appropriate (2004, para.7); this discretion creates an ideal precondition for charge bargaining. With this discretion in place, a further precondition for a system of widespread charge bargaining is for the defence barrister and the defendant to have an interest in engaging with the prosecution's discretion in order to attempt to influence it and reduce the charges. As discussed throughout Chapter 3, there are numerous factors which point towards the defence lawyer's interests (at least in some cases) being to achieve a settlement rather than to take the case to trial. These may be reasons which conflict directly with the defendant's best interests, or the lawyer may believe (albeit possibly based on an assumption of the defendant's guilt) that a charge bargain would be in the defendant's interests. The defendant's primary interest when facing trial proceedings is likely to be in achieving either an acquittal or the least severe sanction possible. An acquittal requires a trial, which carries with it the risk of conviction, the loss of any credit for a guilty plea, and depending on circumstances of the case, the possibility of being sentenced for more numerous or serious charges. If the defendant fears that this risk outweighs the consequences of pleading guilty to a lesser or alternative charge, then a charge bargain may be an attractive option for each of the parties concerned, and with little regulation, frequent charge bargaining is perhaps inevitable. Charge bargains are enforceable as a defendant only pleads guilty to the lesser charges, and unless the prosecution has sought the judge's approval of the reduced charges, there is no judicial



oversight of the process.<sup>132</sup>

As highlighted in the previous chapter, there is a perception that certain offence types lend themselves to cracking more than others, and the primary reason for this is generally said to be that those offences which form part of a graded structure, such as offences of violence and public order, can more readily be reduced to the next serious charge down in the grading. The data presented at Chapter 4.8 on offence types would appear to tally with the view that less serious counts of violence are often offered as alternatives to more serious counts. Similarly, the prosecution offered no evidence to the majority of burglary and robbery charges, and almost a 25% of the theft counts were guilty pleas to theft as an alternative offence. There were also a greater proportion of guilty pleas to the less serious drugs offences in the sample, although the small number of drugs offences (8 in total) makes comparisons difficult. Both arson cases within the sample were originally charged as arson with intent to endanger life, but guilty pleas were accepted to the lesser charge of reckless arson. No sexual offences appeared to have been offered as alternative counts to more serious sexual offences, such as rape, although again, it is difficult to evaluate the data as there were only two rape cases included in the sample. These findings therefore suggest that graded offences are suited to the practice of charge bargaining and that the less serious counts were often added as alternative offences, with the exception of sexual offences. Although the small numbers involved mean that only speculative conclusions can be drawn, if sexual offences do not lend themselves as readily to charge bargaining as others, this would accord with the comments made by Barristers A and D that sexual offences crack less frequently as defendants are more reluctant to admit their guilt to offences which carry a greater social stigma.

The data collected for this study, as well as demonstrating that charge bargaining was commonplace and investigating the offences within which it occurred, also shed light on the means by which the parties came to agreements as to the charges and pleas in the case, which in most cases were examples of explicit bargaining. The strengths and weaknesses of individual cases were exploited by both the prosecution and defence in order to negotiate a mutually acceptable outcome and were the case features which can be regarded as the bargaining tools used in the creation of the terms of charge bargains. Charge bargains were often legitimised by reference to the evidence; most frequently the likelihood of reliable prosecution witness testimony, and a picture emerges of the victim and other witnesses as

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<sup>132</sup> See *Soanes* (1948) 32 Cr App R 136; *Herbert* (1991) 94 Cr App Rep 2; *Grafton* [1993] Q.B. 101

key bargaining tools. It is important to reiterate that in those cases in which offers were made, 25 were initiated by the defence, compared with only eleven which were initiated by the prosecution, and in sixteen cases initial offers were rejected and replaced with counter offers (see Fig. 4.17). In the light of literature on defence lawyers' interests which suggests that they have strong incentives to encourage their clients to plead guilty (see Baldwin and McConville 1977 and McConville et al. 1994 in particular), this could be interpreted as evidence that some defence barristers within the sample were overready to offer up their client to the prosecution on a guilty plea, albeit a guilty plea to modified set of charges. This may have been true of some cases, and Case 41 for example (the facts of which are summarised at Chapter 3.4.5 above) provides clear evidence of a case in which the defendant's barrister approached the prosecution with a possible offer without first discussing the matter with her client, and the content of her witness statement produced for the subsequent proceedings makes plain the explicit nature of the charge bargain offered.

In addition to the fact that the majority of offers made were initiated by the defence, a striking feature of the study's results was the number of counter-offers found within the data, which suggests firstly that charge bargains were not, as a general rule, presented as 'take it or leave it' offers by the prosecution and secondly, that there was scope for negotiation which went beyond one-off offers from either the prosecution and the defence, and that the defence were willing to seek to improve the terms of a charge bargain.<sup>133</sup> Evidently, the individual circumstances varied from case to case, but it is clear that explicit charge bargains featured prominently within the sample and were identified in just under 58% of the informal cracked cases. It was the attendance, or non-attendance, of prosecution witnesses which was most often used as a bargaining tool in order to reach a settlement.<sup>134</sup> Charge bargained cases in which explicit offers were made involved not only alternative offences formally defined as such, but also the functional equivalents whereby guilty pleas were entered to some counts (either counts originally on the indictment or added on the day of the plea change) and the prosecution offered no evidence in respect of other counts, or counts were left to lie on file.

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<sup>133</sup> An illustrative example of this process is to be found in Case 40, which is summarised at 4.16.

<sup>134</sup> The availability and reliability of defence witnesses will no doubt have had an impact on the assessment of the strength of the defence case, and may also have played a role in the acceptability to both prosecution and defence of charge bargains, but without access to defence files, and generally very little relevant information in the prosecution files, it was not possible to make any judgements on this issue in the cases in question.

The results set out in Chapters 3 and 4 of this thesis demonstrate that sentence bargains facilitated both by the sentence discount and by sentence indications, as well as fact bargains and charge bargains were widely employed within the sample. The finding that plea bargaining is widespread, and that it falls into these four primary categories lends additional weight to existing findings and academic discourse on plea bargaining's prevalence in the Crown court. The depth and complementarity of the data collection has made a close analysis possible and with that, quantitative findings on issues such as the effect of the use of 'informal' alternative charges and the frequency of counter offers, and their relationship to plea bargaining.

The following section of this chapter develops the analysis of the findings in order to put forward a broad outline of the nature of the plea bargaining within the sample and to draw some conclusions on the extent to which defendants playing the system or pressures to plead guilty featured as part of the process of plea bargaining and cracked trials.

## **5.6 The nature of plea bargaining within the sample**

### **5.6.1 Outlining the nature of plea bargaining**

Based on the data collected and the analysis presented thus far, it is submitted that it is possible to outline the nature of plea bargaining in the Crown court in the following terms:

- (i) It is almost entirely explicit. Defendants enter guilty pleas in the knowledge that they will receive some benefits or concessions from the prosecution or the state (this differentiates it from a system of tacit bargaining in which the defendant simply has some reasonable expectation that he may be treated more leniently).
- (ii) Both prosecution and defence can negotiate and some degree of 'haggling' is tolerated<sup>135</sup> (as evidenced by the presence of prosecution, defence and counter-offers within the sample).

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<sup>135</sup> McDonald proposes that the amount of 'haggling' permitted is one dimension along which negotiations can vary; the other two being who negotiates, and whether the agreement is treated as a legal contract (1979, pp. 386 – 387).

- (iii) Different forms of plea bargain can be struck with varying levels of specificity and degrees of enforceability.
- a. The sentence discount operates alongside, and in addition to, all other types of bargain and provides an additional (and potentially greater) benefit to defendants entering into charge or fact bargains. The sentence discount is enshrined in statute by s.144 of the Criminal Justice Act 2003 and is currently guided by the 2007 SGC Guideline (the clearer guidelines in place since the introduction of the 2004 SGC Guideline may have the effect of increasing the transparency and specificity of sentence discounting). Although there is no absolute entitlement to a sentence discount following a guilty plea, case law suggests that even a very late guilty plea should be rewarded with a discounted sentence (see for example *Fearon* (1995)).<sup>136</sup>
  - b. *Goodyear* indications are enforceable sentence bargains which, subject to the judge's discretion are given in broad or specific terms.
  - c. Fact bargains represent an exchange of a guilty plea for the specific benefit of an agreed set of facts which are less serious than those originally charged or implied by the offence, and although the prosecution should not agree to a basis of plea which does not accurately reflect the known facts, this does not appear to be strictly enforced.
  - d. Charge bargains are made on specific terms and are enforceable as the defendant pleads guilty only to the specified alternative charges (which may be formal or informal alternative charges).

Plea bargaining's relationship with cracked trials is thus a very close one; a relationship which played a role in 90 of the 109 informal cracked cases. The remainder of this section of this chapter seeks to explore the reasons why plea bargaining has nonetheless been marginalised and questions whether, in the light of this study's findings, the criticisms of plea bargaining which have led to its pariah status are in fact justified.

At this stage, it is useful to summarise two competing criticisms of plea bargaining, firstly the argument that it allows defendants to play the system. Plea bargaining in the UK has

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<sup>136</sup> 2 Cr App Rep (S) 25.

rarely, if ever, been presented in a positive light; it is generally portrayed by the media as a loophole which allows defendants to escape the punishment they deserve, a view which is reinforced by the frequency with which defendants in US crime dramas are able to ‘cut a deal’ and which many members of the public may mistakenly believe to be representative of all types of plea bargain across all jurisdictions. There is a perception (part of a wider phenomenon of public opinion that sentencing is too lenient, see for example Hough and Roberts (1998)) that the sentence discount allows defendants to ‘get away with it’ and to play the system by trying to extort as many concessions as possible from the state.<sup>137</sup> This perception is not limited to the media, or to the public; it also comes across in the RCCJ, 1993 and the Auld Report, and was held by some of the legal professionals interviewed for this study. Announcing proposals that plea bargaining would be used in cases of serious fraud or other serious and organised crime, and as stated earlier, the Attorney General was at pains to clarify that the proposed procedure was not ‘plea bargaining’, aware of the negative connotations of the latter phrase (*The Times*, 4<sup>th</sup> April 2008).

Meanwhile, the groundswell of academic opinion encapsulates the second criticism, that plea bargaining is undesirable, not because it advantages the defendant, but because it disadvantages the defendant by robbing him the free choice to exercise his right to trial and places pressures upon him to plead guilty. The sentence discount is regarded as operating not as a benefit, but as a ‘trial penalty’ which punishes defendants for wasting the state’s resources, and additional charge, fact or sentence bargains operate as further undue inducements to defendants to plead guilty. Baldwin and McConville (1977), McConville (1998, 2002), Hodgson and Belloni (2000), Darbyshire (2000, 2005), Ashworth (2005), and Sanders and Young (2007) all adopt the position that these inducements to plea bargain are so powerful that even innocent defendants may plead guilty. Both sets of objections to plea bargaining have in common a distaste for the inherent betrayal of adversarial principles which plea bargaining entails and the resulting ‘bazaar’ atmosphere (McDonald 1979, p.386) in which plea bargaining reduces the criminal process to an unprincipled series of exchanges of concessions and rights.

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<sup>137</sup> See for example: ‘Guilty plea could see reduced sentences for rapists’ *Daily Mail* 1<sup>st</sup> June 2006; ‘Villains caught in the act will still see their sentence cut for pleading guilty’ *Daily Mail* 16<sup>th</sup> June 2006. ‘Get out of jail in 10 years if you admit murder’ *The Telegraph*, 21<sup>st</sup> September 2004. *The Sun* launched a campaign in 2006 to ‘get soft judges sacked’, see *The Sun* 12<sup>th</sup> June 2006, but also blame ministers for implementing ‘soft’ sentencing laws: ‘judges must administer the law laid down, sometimes bizarrely, by ministers. Nobody understands why sentences are...slashed in return for a guilty plea’ (*The Sun*, 12<sup>th</sup> June 2006).

### 5.6.2 Playing the system?

The purpose of this section is therefore to consider more closely whether the data provided evidence of defendants being able to 'play the system' (resulting in cracked trials), using the sentence discount, sentence indications, or fact or charge bargaining. As the rationale of the 2007 SGC Guideline is that the later the guilty plea is entered, the less discount will be applied, if the Guideline is adhered to, there is little sense in a defendant pleading guilty late in order to secure a greater discount as the outcome will be the reverse. However, there are indications that defendants may still perceive that there are better deals to be had at a late stage, notwithstanding the sentence discount guidelines, which may be because certainly in the past, greater discounts were given at later stages (Baldwin and McConville 1978; Moxon 1988). Judge A stated that:

[Defendants] 'perceive that there are better offers from the prosecution when the case is in for trial than there are when the case is in the for the PCMH...At the PCMH, the Prosecution take a look at the case on paper and say oh no, we won't accept that [offer of a guilty plea to an alternative charge from the defence] and then, as everybody turns up to court, and it becomes apparent to the prosecution that they have one or two little problems...they take the charge which was originally offered by the defence'.

It may be in a defendant's interests to withhold his guilty plea until the case reaches trial particularly if he hopes to secure a charge bargain. The data presented at Fig. 4.17 show that charge bargains were a feature of 58% of the informal cracked cases and thus a common occurrence which, depending on the strength of the case, a defendant could justifiably hold out hope for. As demonstrated by the data presented at Fig. 4.9, which illustrates the important role of witnesses in cases cracking, the strength of a case and the likelihood of a charge bargain being acceptable to both parties often appeared to depend on whether reliable prosecution witnesses had attended court on the day of the trial, which again would mean that a defendant would have an interest in deliberately withholding his guilty plea.

The introduction of sentence indications - the closest procedure England and Wales has to formalised plea bargaining – may also provide defendants with incentives to withhold guilty pleas, in order to ensure that their guilty plea is entered in exchange for a maximum

sentence acceptable to them, and although *Goodyear* indications can be requested at pre-trial hearings, in practice this is rarely the case, as the evidence and issues may not yet be clear. This study's data showed that *Goodyear* indications were given infrequently, and in light of their largely imprecise nature, were at most a form of reassurance for the defendant rather than a particularly good 'deal' which might allow or encourage defendants to play the system.

A fact bargain is in many respects the type of plea bargain in which there is least likely to be the scope or motivation for a defendant to play the system. A basis of plea alone will only ever alter the facts upon which the defendant is sentenced; the offence he pleads guilty to remains unchanged and the risk of conviction at trial arguably makes it unlikely that a defendant would deliberately withhold a guilty plea solely in the hope of achieving a fact bargain. In combination with a charge bargain, however, a basis of plea can assist in substantially reducing the seriousness of offending upon which a defendant's sentence is based on and result in an outcome which does not appear to reflect the true facts of the case, as was also highlighted by the findings of this study. This raises the related issue that the fact that a defendant can simultaneously benefit from multiple bargains could be seen as evidence of playing the system. In a single case a defendant could have a charge reduced, enter a guilty plea on the basis of facts which mitigate the severity of the reduced charge, receive a binding and enforceable *Goodyear* indication, and of course receive credit for his guilty plea in the form of a sentence discount. This could all happen on the first day of trial, at which it becomes apparent that, for example, a distressed prosecution witness is reluctant to give evidence, and 'a reluctant witness both precludes inducement of pleas of guilt and sharply reduces the chances of winning in a trial by jury' (Reiss 1975, p.15). It is this kind of (albeit slightly exaggerated) scenario which fuels the perception that defendants can play the system by exploiting innocent witnesses' weaknesses and 'get off lightly'.

The question arises though as to whether this really is a situation in which the defendant would be 'playing the system'. From the perspective of policy which is increasingly crime control orientated and driven by efficiency, he perhaps is; he is deliberately withholding a guilty plea until the prosecution is forced to make a better offer, and until the judge with a heavy caseload is keen to give a sufficiently attractive *Goodyear* indication. Yet it is not the defendant who has created the weaknesses in the prosecution case, and he is not responsible for CPS or court targets and nor does he have any impact on the reliability or

willingness to testify of prosecution witnesses.<sup>138</sup> If, on the day of trial, the prosecution case is not strong enough to sustain a trial, it is difficult to see how this is the responsibility of an ‘uncooperative or feckless’ defendant (Auld Report 2001, para. 9). Certainly, for those defendants who were factually guilty of the offences originally charged but were sentenced for fewer or lesser charges, the system worked to their advantage and they may have considered themselves fortunate, and as discussed earlier, there were cases in which the eventual charges to which guilty pleas were entered did not bear a close resemblance to the facts alleged. This notwithstanding, in order to maintain any legitimacy in a criminal justice system founded on due process principles, the question must be not whether a defendant was factually guilty of the charges in question, but whether he was legally guilty.<sup>139</sup> If the prosecution fails to even attempt to prove the defendant’s legal guilt in respect of the original charges and the defendant’s guilt of the reduced charges is proven only by the defendant’s guilty plea rather by prosecution evidence, then the defendant, far from playing the system, is giving up his right to have the prosecution prove its case. Ultimately, the prosecution always has the option of proceeding to trial but the defendant does not always have the option of pleading guilty to reduced charges, and in accepting guilty pleas to lesser or fewer offences it is the prosecution, not the defence, who have the greater power to ‘play the system’ by circumventing an adversarial trial in order to avoid the risk of acquittal and the expenditure of additional resources. Moreover, it could be argued that in some cases within the sample (such as Case 67 and Case 68, at Chapter 4.9) although the defendants’ eventual guilty pleas were to reduced indictments, the defendants’ best interests may have been better served by going to trial on the original indictment, as there appeared to be a very weak prosecution case.

The analysis above has demonstrated that although there is a perception that defendants cause cracked trials by ‘playing the system’, and factually guilty defendants may benefit from the widespread use of, in particular, charge bargaining, in reality defendants are at best able to take advantage of weaknesses in the prosecution case, which it is submitted can not equate to playing the system. Although there were some cases within the present study’s sample in which it was clear that the defence had the ‘upper hand’, the defence was only ever empowered as a result of flaws in the prosecution evidence<sup>140</sup>; there is simply

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<sup>138</sup> Unless of course the defendant has intimidated a witness in order to dissuade them from testifying; the sample contained 8 counts of witness intimidation.

<sup>139</sup> See further McConville and Mirsky (1995).

<sup>140</sup> Cases 67 and 68 (summarised at Chapter 4.6 above) were two such cases, in which the lack of reliable prosecution witnesses in attendance on the day of the trial was so detrimental to the case that in Case 68 a plea of guilty to a single count of actual bodily



little scope in reality for the defendant to benefit from attempting to play the system.<sup>141</sup>

There is, however, considerable scope for a defence barrister to play the system to his financial and professional advantage in order to secure the highest fee chargeable without being forced to return other briefs or take the case to trial, and to cooperate with the prosecution advocate. These issues were analysed throughout Chapter 4, which argued that in many cases, the barristers' interests may be best served by defendants pleading guilty, which provides an incentive to plea bargain (or, as was the case in Baldwin and McConville's findings within their sample (1977), to exert pressure on defendants to plead guilty). The following paragraphs therefore examine whether plea bargaining, as documented by this study, created, or was an element of, pressure upon defendants to plead guilty.

### 5.6.3 Pressures to plead guilty?

The most serious criticism frequently levelled at plea bargaining by academics is that it creates undue pressure on defendants to plead guilty, to the extent that even innocent defendants may be induced to plead guilty (Dell 1971; Bottoms and McClean 1976; Baldwin and McConville 1977; Zander and Henderson 1993, were all empirical studies in which it was found that innocent defendants pleaded guilty on occasion). This section of Chapter 5 addresses the extent to which there was evidence that pressures to plead guilty appeared to have been exerted on the defendants in the cases sampled, and examines interviewees' views on the issue. As surveying defendants was beyond the remit of this study, it is not possible to assess the extent to which the defendants in the cases sampled as a whole felt themselves pressurised and as such, it is not possible to make a direct comparison between this study's findings and previous research which did interview or survey defendants. There were however two individual cases in which the prosecution file did provide clear evidence that the defendants in question had felt themselves to be pressurized (Cases 91 (at 3.4.6) and 41 (at 3.4.5)).

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harm was accepted even though the defendant had been charged with causing grievous bodily harm with intent and three counts of witness intimidation. In Case 67, the defendant offered a guilty plea to a 'common' assault in place of the actual bodily harm charge with which he was originally indicted. In both cases, the defence appeared to have had the upper hand in determining the outcome of the case.

<sup>141</sup> It has been suggested that plea bargaining favours recidivists as they come to know the 'system' and are better placed to play it. Previous convictions did not, however, appear to be a particular feature of cracked trials, at least insofar as could be established from the nature of the data gathered for this study (Fig. 4.13).

Other than these cases, the data collected from prosecution case files did not lend themselves to assessments of any pressure on defendants, but the legal professionals interviewed did provide data which related to their perceptions of the extent to which defendants were under pressure to plead guilty, and their attitudes to any such pressure. *Goodyear* indications were a particular feature of cracked cases which interviewees viewed as potentially creating pressure on defendants to plead guilty. As stated in Chapter 3, Barrister D described them as a 'lever' with which to crack trials and accepted that whilst they did create pressure on defendants to plead guilty, they were likely to be considering entering guilty pleas in any case if they had requested a sentence indication; Judge B described them as a tool with which 'shortcut cases'. Judge B's comment would suggest that he also viewed them as a device with which to encourage defendants to plead guilty and to crack trials where it appeared that there were problems with the prosecution case.<sup>142</sup>

Barrister D's comment was telling in its inference that it is legitimate to create a pressure on defendants who are already considering a guilty plea and Judge A's attitude was similar insofar as he advocated implementing case management measures to encourage defendants who appeared to be guilty, to plead guilty, and to dissuade them from a trial, such as putting the case to the back of the list to allow the defendant time to 'confront... the issues'. Although Judge A explicitly stated that he would not put any pressure on a defendant, singling out defendants who, in his view, are guilty and delaying their cases so that they can be more 'realistic' could lead to defendants feeling pressure to plead guilty, not least as it would be apparent to them that the judge already believes them to be guilty. As Sanders and Young write '[n]othing is more likely to cause a defendant to abandon a not guilty plea than the official(s) conducting the trial expressing a view that the defendant is guilty' (2007, p.426). Perhaps with increased safeguards in place, the issue is no longer the overt 'pressure' of the kind documented by *Negotiated Justice*, but the uncomfortable proximity of what legal professionals may consider to be a routine, realistic, approach to a case, to advice defendants may perceive as pressure. It may also be the case, however, that the degree of transparency afforded by *Goodyear* indications at least provides a defendant with safeguards against the pressure which may previously have been created by 'informal' sentence indications. As Judge B stated, they used to happen 'behind the scenes' and 'there

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<sup>142</sup> It is possible that this is not the meaning Judge B intended; for a judge to offer an inducement to a defendant to plead guilty in order to circumvent a weak prosecution case would be improper, but within the context of the conversation, it was not possible to discern any alternative meanings.

was a fiction of sticking to the rules’.

A notable theme which emerged during interviews was that several of those interviewed felt that although the sentence discount and sentence indications could have the potential to encourage (or pressurise) defendants to plead guilty and thus enter into plea bargains, they often did not exert the influence on the defendant which may have been expected. A defendant with his own reasons for pleading guilty is unlikely to feel pressurised into doing so, whereas a defendant who previously had no intention of pleading guilty may feel pressurised to do so if, once at court, his barrister impresses upon him that a substantial discount would reward a guilty plea, particularly if the defendant has been told (or has gained the impression) that he does not stand a good chance of acquittal. (See further Sanders and Young (2007) pp.425 – 428 on the relevance of the prospect of conviction). As stated earlier, Judge B believed that as ‘the criminal has an entirely different agenda’ *Goodyear* indications did not always have the desired effect on them. Barrister B felt that the graduated sentence discount would not work as ‘you can’t put a formula on it, it can’t be reduced to that’ and Barrister A felt that the sliding scale of discounts would not have an effect on defendant as ‘punters don’t think like accountants’. There is some support for this argument in the literature on criminal psychology, and there are established links between the propensity for criminality and impulsivity and a lack of delayed gratification (Bower 1995, p.232). In the context of plea bargaining decisions specifically, Bibas writes that ‘over-confidence, self-serving biases, denial mechanisms, discounting of future costs, risk preferences...all skew bargain outcomes’ (2004, p.2469) and that risk and loss aversion are distributed unequally and are dependant on factors such as criminal history, intelligence, gender, and marital status (ibid., p. 2512). Without surveying defendants, it is difficult to make judgements on the actual effects of inducements on individuals, but it seems clear that there are likely to be a range of personal factors which influence whether a defendant feels pressurised or encouraged to plead guilty by the existence of the sentence discount or *Goodyear* indications, and it would be an oversimplification to state that defendants are uniformly pressurised by these measures, it is simply that they are systemic features with the potential to create pressure. Likewise, whether charge bargains create an undue pressure on defendants to plead guilty will depend on a variety of factors: whether the defendant had other motivations to plead guilty, the relative strength of the prosecution and defence cases, the terms in which the defendant’s barrister gives advice on the charge bargain, and whether it is initiated by the defence, with the defendant’s informed agreement, or without, or whether it is initiated by the prosecution.

Fact bargains are less likely than other forms of plea bargain to create an undue pressure to plead guilty as less benefit accrues to the defendant upon entering into a fact bargain compared with other types of bargain; the difference between a guilty plea to specified offences and the same guilty plea with an accompanying basis of plea is likely to be, at most, only a small sentencing differential, and within the sample, it often appeared that a basis of plea was indicative of little more than either the defendant or the prosecution wanting to ensure that they had the 'last word' and an input into the agreed facts of the offence in cases where the offence itself could not be negotiated further (see in particular Case 74 at 4.14).

Previous literature (in particular Hood's 1992 study on race and sentencing, but see also Mhlanga 1997 and Flood-Page and Mackie 1998) has indicated that the sentence discount, and plea bargaining more generally, may operate to indirectly discriminate against ethnic minorities who tend to plead guilty less frequently than white defendants (Hood 1992; Fitzgerald 1993). This may be because they are more likely to be not guilty, as discrimination at earlier stages of the criminal justice system contributes to an overrepresentation of ethnic minorities being charged, and cultural differences in willingness to admit guilt or to cooperate with the criminal justice system may also be relevant (Hood 1992). They are therefore not as frequently entitled to the benefits which accompany guilty pleas, and Tonry advocates abolishing the sentence discount for this reason (2004, p.87). The present study's sample contained only 19 defendants who were recorded as being of an ethnicity other than non-white European, so an analysis of the data is necessarily very limited by the small numbers involved. However, the findings are interesting, and appear to support previous literature. Ethnic minorities had the highest rates of effective trials (the highest being 80% for Afro-Caribbeans), compared with only 13.5% of white Europeans, and none of the cases involving Afro-Caribbean defendants were recorded cracked trials, and only one was an informal cracked trial (although there were only five Afro-Caribbean defendants in total) (Fig. 4.18).

The data at Fig. 4.19 set out the offers and *Goodyear* indications by ethnicity, and again, the results suggest that ethnic minorities (Afro-Caribbeans in particular) were less likely to have engaged in the process of offers being made and trials cracking. Just one *Goodyear* indication was given to a non-white European defendant, and in all cases in which there was an offer originating from the defence, and the defendant's ethnicity was recorded, the defendant was white European. In 80% of the cases against Afro-Caribbeans, 85.7% of those against Asians and 66.7% of those against Arab defendants no offers at all were

made, compared with 55.5% of white European defendants. This again suggests that, based on the very limited data available, all parties appeared to be more inclined to bargain in cases involving white defendants, and least likely to in cases involving Afro-Caribbean defendants, supporting previous research findings which suggest that plea bargaining and the sentence discount operate in a racially discriminatory fashion (which the 1993 Royal Commission on Criminal Justice chose not to engage with, despite Hood's findings being available to them).

An analysis of the data extracted in the course of this study therefore shows that, as found by previous studies and argued by much of the literature on plea bargaining in England and Wales, the existence and widespread use of plea bargaining clearly has at least the potential to create pressures to plead guilty, and that it may discriminate against ethnic minority defendants. The argument that it uniformly operates to create undue pressures upon defendants in individual cases to plead guilty is, however, questioned by the present analysis. Measures put in place to encourage defendants to plead guilty may not be as effective as the government has intended them to be, and whether charge or fact bargains create pressures to plead guilty, or whether they simply allow defendants to exploit weaknesses in the prosecution case, will depend very much upon the individual facts of the case. It does seem, as far as can be inferred from the type of data collected, that barristers and judges are on the one hand wary of being seen to exert pressure on defendants, and that defendants being 'terrorised' (Baldwin and McConville 1977, p.46) into pleading guilty may be a thing of the past, yet on the other hand some of the views expressed by those interviewed suggests that it is deemed acceptable to exert *some* pressure on those defendants who appear to be guilty.

There is recent case law in the form of *McKinnon v United States*<sup>143</sup>, which provides some indication of the current approach of the appellate courts to the issue of plea bargaining and pressure to plead guilty. The case was an appeal against an extradition order, prior to which the appellant (a British citizen) had engaged in plea bargaining with the US prosecutorial authorities. The appellant had been informed that if he pleaded guilty he would receive a custodial sentence of 3 to 4 years, only one of which would be spent in the United States. If he did not cooperate and was convicted, McKinnon had been told to expect a sentence of 8 to 10 years, all of which would be spent in the United States. McKinnon argued that this was an abuse of process and that he had been subjected to

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<sup>143</sup> [2008] UKHL 59

undue pressure, contrary to the guidelines in *Goodyear*, as *Goodyear* does not permit a judge to give the defendant the two alternative sentences which would be imposed on a guilty plea or conviction respectively, and as the sentencing differential was so great. The House of Lords held that the US authorities has not contravened the *Goodyear* guidelines, as their purpose was to limit judicial, not prosecutorial, indications of sentence and that ‘the discount would have to be very more generous than anything promised here...before it constituted unlawful pressure’ although the court did concede that ‘[i]n one sense all discounts for pleas of guilty could be said to subject the defendant to pressure, and the greater the discount the greater the pressure’ ([2008] UKHL 59 at 38 *per* Lord Brown). The judgment reinforces the conclusion drawn from this study’s data that *some* degree of pressure is acknowledged as accepted as being inherent in the system, but that it would only be seen as unacceptable, undue pressure in an extreme case.

This raises the question as to what is meant by *undue* pressure, if some pressure is tolerated as inevitable in a system which rewards guilty pleas, where should the line between legitimate and undue pressure be drawn? As the approach of this thesis has been to view cracked trials and plea bargaining primarily from a defence perspective, it is argued that for a defendant, undue pressure must necessarily be any pressure which he perceives to be undue and feels deprives him of making as free a choice as could be expected in the circumstances. Whilst individuals’ propensities to feel placed under pressure can not be regulated, one way of limiting the potential for undue pressure (whilst maintaining a system which rewarded guilty pleas) would be to put maximum sentencing differentials in place so that defendants who are reluctant to plead guilty and / or innocent defendants are not placed under pressure by significant sentence reductions. What would constitute a significant enough sentencing differential to create an undue pressure is, however, not a straightforward issue. A sentence discount of one third may not be a large differential in many sentences for less serious offences, but could make a huge difference to a long sentence, or a tariff for murder. The more serious the offence, the higher the stakes, and the greater the potential, therefore, for undue pressure. Moreover, Flood-Page and Mackie (1998) found that the effect of the sentence discount was greatest in the most serious sexual and violent offences, because those were the offences defendants were least likely to have pleaded guilty to at an early stage, again suggesting that pressure may be greater for defendants accused of the most serious crimes.<sup>144</sup> If, as seems inevitable, the sentence

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<sup>144</sup> 70% pleaded not guilty to rape compared with 39% to other sexual offences. The average sentence on conviction was 8.1 years, and 3.9 years after a guilty plea. 67% pleaded

discount is to remain a cornerstone of sentencing and criminal justice policy, then research needs to be carried out which considers its effect on defendants and whether it not only discriminates against ethnic minorities, but also places the greatest pressure on those who are already facing the most severe penalties.

In summary, although the data discussed above revealed individual instances of defendants being able to benefit from the system of plea bargaining and pleading guilty to a substantially less serious set of charges than had originally been laid, and of evidence that pressures to plead guilty, from a variety of sources, could be present, the analysis above (both of issues specific to defence lawyers in Chapter 3, and the analysis of the other qualitative and quantitative data in Chapters 4 and 5) has shown that plea bargaining does not fit squarely into either set of objections and alternative conceptualisations of plea bargaining which have generally been applied only to the American system of plea bargaining are therefore considered below.

## **5.7 Alternative models of plea bargaining**

As Scott and Stuntz write:

‘[T]here is something puzzling about the polarity of contemporary reactions to this practice. Most legal scholars oppose plea bargaining...Nevertheless, most participants in the plea bargaining process [including defendants]...seem remarkably untroubled by it’ (1992, p. 1909).

Perhaps the answer lies in the possibility that the participants view the processes of plea bargaining (and thus some of the underlying causes of cracked trials) in very different terms to policy makers or academics. Words such as ‘consensus’, ‘concessions’ and ‘contract’ are used frequently, but inconsistently, within the existing literature on conceptualisations of plea bargaining, which has developed in a piecemeal fashion over the past decades. This thesis has taken ‘consensus’ to mean something akin to the dictionary definition of ‘agreement in opinion’. If a plea bargain is arrived at by consensus, the final outcome reflects the defence and prosecution’s assessment of the correct, or just, outcome. This differs from a contractual or concessions model in that, although existing literature does not consider the issue of whether a contractual model and one which emphasises

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guilty to grievous bodily harm with intent 67% compared with 29% to other violent crimes. The average sentence after conviction was 4.25 years, and 4 years after a guilty plea (p.91).

concessions are synonymous<sup>145</sup>, it is submitted that they both have at their core the principle that rights, benefits and risks can be traded and that while the final outcome may not be arrived at by consensus as to the 'right' outcome, it is an agreement which both defence and prosecution have subscribed to.

#### 5.7.1 Plea bargaining as consensus

Plea bargaining has been described as, or considered in the light of, a consensual model of justice by the American literature (for example Heumann 1974; Rosset and Cressy 1976; Church 1978; Jacob 1984; Nardulli, Eisenstein and Flemming 1985) and literature on continental European criminal justice systems (Jung 1997).

Nardulli, Flemming and Eisenstein consider both concessions and consensus models in the context of their empirical findings and describe the consensus model as one which stresses the importance of shared understandings in 'lubricating the court's machinery' (1985, p.1107) and cite Rosset and Cressy's view that:

'Even in the adversary world of law, men who work together and understand each other eventually develop shared conceptions of what are acceptable, right and just ways of dealing with specific kinds of offenses, suspects and defendants. These conceptions form the bases for understandings, agreements, working arrangements and cooperative attitudes' (1976, p.90).

Nardulli, Eisenstein and Flemming likened this to their finding that there were well established 'going rates' for specific offences within the counties they studied (1985, p.1109) and that this enabled there to be a consensus about the 'right' outcome. There is a considerable body of literature on lawyers' working practices which also emphasizes the role and significance of shared understandings in creating routinised working practices (for example Blumberg 1967b; Feeley 1973; Alschuler 1975; Jacob 1984; McConville et al. 1994; McConville and Mirsky 1995). This is not likely to be as significant a feature of the UK Crown courts to the extent that it is described by the American literature, primarily as crown prosecutors are not able to hold out promises of specific sentences in the way their

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<sup>145</sup> The literature on contractual models deals largely with applying classical contract theory to plea bargains, and does not expressly consider the relationship between contract theory and concessions more generally (see for example Schulhofer 1992; Scott and Stuntz 1992a, 1992b).



American counterparts are, so it would be difficult for ‘going rates’ to establish a sufficient degree of certainty, and plea bargains would be expected more frequently when court staff worked more closely together (Jacob 1984, p.194), as is the case in most jurisdictions within the USA. Barristers in England and Wales, whilst not as bound to particular courts or working groups can frequently appear before the same judges (particularly on the regional circuits) and may develop an understanding of particular judges’ approaches to sentencing, or local court practices, and advise their clients accordingly.<sup>146</sup> As Jacob writes, ‘cooperation and collaboration is the result of courtroom members’ natural preferences to avoid conflict and meet administrative targets’ (ibid., p.193).

The overwhelming flaw of this consensual conceptualisation of plea bargaining, if it is to be viewed as a legitimate means of case disposition, is that, as it is generally conceived, the consensus never involves the defendant; the ‘shared conceptions’ are those of the defence and prosecution lawyers and perhaps the judge and other court staff more widely. In light of the negative perceptions of the public to sentencing (Hough and Roberts 1998), they are perhaps not the shared conceptions of wider society either; lawyers would effectively exist in a microcosm in which their concepts of ‘just’ outcomes dominate the delivery of criminal justice, and as Chapter 3 demonstrated, these concepts may conflict with defendants’ best interests. Some commentators (although significantly, writing primarily of inquisitorial systems) have nonetheless described plea bargaining as a consensual exchange from which even defendants can benefit and become empowered. Jung argues that:

‘The notion of criminal law as the ensign of the monopoly of power vested in the state, and as clearly distinct from private law, begins to falter. Elements of negotiation and participation, hitherto restricted to the sphere of private law litigation, are proliferating in all phases of criminal procedure. This indicates a shifting equilibrium between state, society and the individual’ (Jung 1997a, p.116).

Jung writes that plea bargaining, along with the increased use of mediation and restorative justice as an element of traditional criminal justice represents a shift in values. Similarly Luderssen (1990, p.420) expresses hope that the principle of consensus justice will ‘do away with the ‘criminal’ in ‘criminal law’ (cited Jung 1997, p.115). Given the power differential

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<sup>146</sup> An example of this within the present study’s findings was Barrister B’s comment that there was almost ‘no such thing’ as a s.18 OAPA 1861 at Bolton Crown court, and that the s.18 grievous bodily harm with intent charge was invariably reduced to s.20 of the OAPA 1861, grievous bodily harm without intent.

between lawyers and defendants, and some of the attitudes expressed towards defendants, it seems unlikely that defendants can at present meaningfully engage with a consensual process of plea bargaining. Although there were some individual cases within the sample in which it appeared that the defendant was in some sense empowered (see Chapter 4.14 – 4.15), this was not as a result of a shared understanding between the defendant, defence barrister and prosecution as to the ‘value’ of the case, but rather as a result of a weakened prosecution case which gave the defence barrister greater bargaining power with his prosecution counterpart in order to secure a more favourable agreement on behalf of his client. Daudistel, Sanders and Luckenbill describe the shared conceptions of a case being between the prosecution and defence advocates, and that ‘advising the defendant of the settlement’ is a separate stage of the process (1979, p.224). It is argued that, to the extent to which this can be seen as a form of plea which is neither predominantly a manifestation of ‘playing the system’ or of pressures to plead guilty, a contractual model emphasising the exchange of concessions and the strengths and weaknesses of bargaining positions could be more appropriate. Even Jung acknowledges that in order to safeguard the defendant’s position in a system of consensual plea bargaining, a ‘contractual situation’ which ensures as far as possible that the defendant makes an informed and voluntary choice to plead guilty, is necessary (1997, p.118).<sup>147</sup>

### 5.7.2 Bazaar style justice or supermarket style justice? Plea bargaining as contract

The ‘concessions’ model of plea bargaining is well established, and could be described as the predominant means by which plea bargains are viewed, often critically, within much of the American literature (Nardulli, Flemming and Eisenstein 1985, p.1108). The application of contract theory to the concessions model, either to legitimise it (Scott and Stuntz 1992a, 1992b), or to argue that it operates inequitably (Schulhofer 1992) gained momentum during the early 1990s. The essence of a concessions model is that the wide range of issues within a trial which can give rise to strengths and weaknesses in a case such as evidentiary flaws or the credibility of witnesses become tools by which concessions can be extracted, agreements made and deals struck. This conceptualisation of plea bargain can be viewed either as an unprincipled ‘bazaar’, or a more regulated and orderly ‘supermarket’. McDonald describes plea bargaining in some American jurisdictions as deals concluded in a

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<sup>147</sup> Menkel-Meadow makes the interesting point that, at least in popular culture, negotiation is regarded and portrayed in an over simplified manner, and that the goals of negotiations are not necessarily to ‘defeat’ or to ‘get the best of’ the ‘other side’ (2004, p.583). It is doubtful whether a more genuine and consensual approach to negotiation, as she suggests exists, applies given the particular power differentials in the criminal process.

'bazaar atmosphere' (1979, p.386) and Nardulli, Flemming and Eisenstein write that the term plea bargaining 'evokes images of a Turkish bazaar, extensive horsetrading, back room deals, etc.' (1985, p. 1106). McDonald described American plea bargaining in these terms to distinguish it from jurisdictions such as the UK, which he argued might not conduct plea bargains in a bazaar atmosphere, but did engage in the functional equivalent thereof as a result of implicit bargaining and expectations of leniency (1979, p.386). It is, however, submitted that, as argued above, plea bargaining in England and Wales today is explicit, and the range of concessions, negotiations, offers and counter-offers (and broad acknowledgement thereof by legal professionals) gives rise to a system which could be described in term of a system of explicit concessions.

To clarify what is meant by the bazaar analogy in this instance; it is taken to describe a system of case dispositions in which there is some degree of disorder and inconsistency, scope for haggling, the values of commodities (in this case, the sentences and/or charges appropriate to factual situations) fluctuate and the best deals are to be had by those who maintain a good relationship with those with whom they deal frequently. By contrast, Nardulli, Flemming and Eisenstein write that courts may 'also operate more like supermarkets in that they are more orderly than the freewheeling concessions model may suggest' (1985, p.1109). In a 'supermarket' concessions model of plea bargaining, prices (that is, sentences, charge reductions and outcomes) would be more firmly fixed, with less scope for haggling, but also less scope for uncertainty and 'bad deals'.

There was considerable evidence within this study's data which would support the analogy of plea negotiations as being conducted in either a bazaar or supermarket atmosphere. Throughout the case files and the interviews the language used echoed that of contractual exchanges: there were repeated references to guilty pleas being 'offered' or 'accepted', and 'deals' being 'taken'. The practice of the Crown or the defence 'indicating' that it would be willing to offer, consider or accept guilty pleas to certain offences mirrors that of contractual invitations to treat and the use of the stock phrase 'indicate a willingness' legitimises the haggling, perhaps making the system more akin to a routinised, regulated supermarket environment where patterns of expectations are relatively fixed.<sup>148</sup>

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<sup>148</sup> It is interesting to note that King found that the limited evidence on plea bargaining in England between 1740 – 1820 indicates that parties had broad discretion and that the process consisted of a complex, multidimensional set of decision making processes, perhaps suggesting that even at this early stage, plea bargaining may have exhibited some features of contractual-style exchanges (2000, pp.355 – 356).

A well known debate on applicability of contract theory to plea bargaining occurred between Schulhofer, and Scott and Stuntz, in a series of articles in the *Yale Law Journal* in 1992. Scott and Stuntz argued that plea bargains should be viewed in terms of contract theory, not rights, and that if plea bargains are analysed in contractual terms, they are not necessarily coercive, and that contractual measures can in fact be implemented to remedy many of the problems inherent in plea bargaining. The authors argued that defendants should have the freedom to contract or exchange entitlements in criminal proceedings and that to deny them that ability (by abolishing plea bargaining) undermines the value of those entitlements (1992a, p.1913). Easterbrook had similarly written that defendants are entitled to either use or sell their right to trial (1991, p.1975) and Scott and Stuntz argued that the elements of contracts which would make them unenforceable (such as duress or unconscionability) do not as a matter of course, apply to plea bargains and that large sentencing differentials do not equate to guilty pleas entered under duress, but rather that the right to take a case to trial is very valuable and the prosecutor is willing to pay a high price for it (1992a, p.1921). They also argued that a bargain is only unconscionable if it is a 'take it or leave it' offer which does not react to individual preferences (ibid., at p.1924) but that plea bargains involve *bargains* whereby the terms of the agreement can be modified and individualised. This element of Scott and Stuntz's approach is supported by the presence of counter offers within the cases sampled for this study and the individualised nature of charge bargains, in particular when combined with bases of plea and/or *Goodyear* indications.

Schulhofer (1992), however, was critical of this standpoint, arguing that there are flaws within the plea bargaining system which Scott and Stuntz fail to address such as condemnation, punishment and litigation time - public goods which a contractual model can not incorporate, and that it is not possible to monitor the contractual processes of a plea bargain to ensure that gains outweigh the costs (1992, p. 2009). Similarly, Baldwin and McConville examined the possibility of a defensible model of plea bargain in England and Wales following *Negotiated Justice* but concluded that, as the system could not ensure that the defendant's plea was free and voluntary or that each case was disposed of according to the evidence, plea bargaining could not be defended as ultimately, it was 'not calculated to avoid injustice' in the way in which a trial was (1979, p. 216).

Nonetheless, there are indications that the UK system of plea bargaining is becoming increasingly contractual and enforceable. As argued earlier in this chapter, the forms of plea

bargain identified by this study were explicit and, to a large degree, enforceable exchanges of concessions. This is most clearly true of *Goodyear* indications which are at least in theory, a clear and enforceable bargain between a defendant and the state and empower the defendant by providing him with the certainty that the sentence imposed will not exceed a specified maximum. That *Goodyear* indications are enforceable is not doubted and case law such as *McDonald* [2007] Crim LR 737 shows that the Court of Appeal considers *Goodyear* indications to be binding to the extent that, if given in error, they override statutory requirements to impose an indeterminate sentence for public protection. An analysis of the data gathered for this study has, however, questioned the value of *Goodyear* indications to defendants, in the light of the finding that the indications given were often very broad (Fig. 4.16). Moreover, Vogel, in her exposition of the origins of plea bargaining, writes that there are similarities to be drawn between criminal defendants and involuntary labour and puts forward the argument of dualistic liberty (2007, pp.315 – 315). Workers who were formally free in the sense that they had the capacity to leave their employment and were legally permitted to do so were nonetheless constricted by the fact that they found it difficult to claim wages to which they were entitled to if they chose to leave their employment, so were subject to economic coercion to remain. Equally, defendants have the freedom to plead guilty or not, and effectively to contract with the state as to the terms of their plea. However, as Vogel argues, ‘while the choice is formally free, terms of the agreement are powerfully leveraged by the more resource-rich participant in each case’ (ibid., p.317).

Mitigating the effects of this lack of real contractual freedom, there is a general trend towards increased clarity in rewards for guilty pleas as demonstrated by the 2004 and 2007 SGC Guidelines and the graduated system of sentence discounts they developed, and this is true also in terms of the enforceability of promised sentence discounts. In *Jackson* [2000], the Court of Appeal felt itself bound to enforce a sentence discount promised by the trial judge despite the fact that it was inappropriate on the facts and Darbyshire too has commented on the fact that cases such as *Peeverett*<sup>149</sup> suggest that the Court of Appeal will prioritise the enforceability of promises made to defendants over undue leniency or conflicting statutory sentences (2005, p.281). These recent developments may have the effect that a guilty defendant has (some) increased benefit from the greater transparency and certainty of the system within which he may exchange his right to trial for other concessions, and it is submitted that a contractual analogy is apt. However, even Scott and Stuntz write that ‘contract makes the disquiet of critics seem sensible too, since the

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<sup>149</sup>[2001] EWCA Cr App R 416

bargaining dynamic shortchanges the innocent' (1992a, p.1968). A clearer, enforceable exchange of concessions will not only be more attractive to guilty defendants, but also to innocent defendants, and a contractual conceptualisation of plea bargaining can only be defensible if it can ensure, in so far as possible, that legally innocent defendants are not induced, either by lawyers or by features inherent in the system, such as sentence indications, to plead guilty contrary to their own best interests.

Empirical research which addresses alternative models of plea bargaining, or a re-examination of existing research in the light of alternative conceptualisations would assist in attempting to explain the nature of plea bargaining practiced in Crown courts of England and Wales. It is argued that purely consensual approaches to plea bargaining are unlikely to be founded in the reality of the practice; consensus to which the defendant is party requires a level of voluntariness which will never be present in criminal proceedings. Contractual perspectives more accurately describe the exchanges of entitlements based on relative bargaining positions determined by the evidence and other facts of the case which were documented by this study, but it is doubtful whether even the application a full range of contractual safeguards could ever position a defendant at a level of bargaining power sufficiently close to that of the prosecution. Given the inherent problems of the principal – agent dynamic between the defendant and his barrister, it is unlikely that a defendant can even achieve equality of bargaining power with his own lawyer, let alone the prosecution. The greatest inducements to plead guilty would invariably be offered to those defendants with the strongest cases, as their right to trial would have greater value, and it is questionable whether defendants in this situation could be immune from unconscionable pressure to 'sell' their chance of acquittal.

## **5.8 Conclusions**

Chapter 5 has continued this thesis's analysis of its empirical data and shown that plea bargaining was commonplace within the cases sampled, and that the legal professionals interviewed felt that negotiation was a routine feature of Crown court cases generally. This chapter has argued that plea bargaining needs to be conceived of broadly and that the term should encompass a range of explicit and implicit bargaining procedures, and that a broad definition of plea bargaining as any guilty plea entered by a defendant who perceives that he will receive some benefit from the state is one which aptly describes the boundaries of plea bargaining. It was argued (at Chapter 5.3.5) that each type of plea bargain documented by the study (sentence discount, sentence indications, fact bargains and charge bargains)

was explicit: although there are varying levels of certainty, transparency and enforceability accompanying different bargains, they are not merely tacit, and recent developments suggest a movement towards transparency and enforceability.

Despite this development, evidenced by a clearer system of sentence discounts, formal sentence canvassing, the Serious Fraud Office and SOCA's powers, and the dicta in *McKinnon v United States* [2008] UKHL 59, plea bargaining has not yet been formally acknowledged as a widespread means of case disposition. It is perhaps more acceptable to the general public (and thus to policy makers) when it can be presented as concerning only serious financial crime, which impacts on the population generally and is not seen as involving 'dangerous' criminals getting off lightly, but is presented as a means by which to convict sophisticated organised criminals who would otherwise walk free.<sup>150</sup>

Plea bargaining's role as a cause of cracked trials has therefore been neglected, despite empirical evidence of a relationship between late guilty pleas and plea bargaining. The data presented for this study showed that in 90 of the 109 informal cracked trials, a plea bargain took place in respect of at least one count; plea bargaining and cracked trials were inextricably linked. The two key criticisms of plea bargains, which contribute to the lack of desire to openly acknowledge the extent of plea bargaining (that they allow defendants to play the system, or that they exert undue pressure on defendants), were examined in the light of the data and it was argued that there was no evidence that any type of plea bargain routinely fitted into either description. Alternative conceptualisations of plea bargaining as either consensual or contractual agreements were therefore considered. There was evidence within the data that could sustain a contractual model, with regard to the nature of offers, acceptances and counter offers, particularly in the light of recent court decisions which have prioritised the enforceability of plea or sentence agreements. These decisions are to be welcomed as they protect the defendant who relies on assurances to his detriment. It may be that, by viewing plea agreements as contractual exchanges, it is possible to remedy some of their flaws with recourse to contractual principles of equality of bargaining power and enforceability. Nonetheless, any process which involves the state potentially invoking its powers of detention, trial and imprisonment is inherently coercive, and contract theory does not provide the tools with which to overcome this problem. Simply because plea bargaining as a general principle is ethically dubious, however, is no justification for criminal justice policy to continue to distance itself from acknowledging its existence; doing

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<sup>150</sup> See for example Tony Levene, *The Guardian* 19/3/09 where the emphasis the Serious Fraud office's powers to plea bargain is on 'banning corrupt professionals' and 'fraudsters'.

so exacerbates the problems it potentially causes and has the consequence that the response to cracked trials is neither evidence based nor consistent.



## CHAPTER 6

### CONCLUSIONS

This thesis began by outlining what is often referred to as the ‘problem’ of the cracked trial. Policy makers and criminal justice administrators view cracked trials as an avoidable waste of resources and as a source of dissatisfaction for witnesses. Official statistics are collated and interpreted in a way which suggests that defendants’ late guilty pleas are the predominant cause of cracked trials; accordingly, efforts have been made both nationally and in local court centres, to reduce the number of cracked trials, primarily by increasing and clarifying the inducements to defendants to plead guilty at an early stage in proceedings. The one aspect of cracked trials which policy has, however, consistently failed to engage with is the extent to which plea bargaining causes trials to crack. Although the research on plea bargaining in the UK is notably less developed than that in the USA, studies have repeatedly demonstrated the link between late guilty pleas and plea bargaining. Nonetheless, plea bargaining in the UK remains outside the borders of what is considered acceptable criminal procedure, with the exception of complex fraud cases and organised crime. The practice is generally seen as being untenable (officially) from a policy perspective because of the fear that it allows defendants to play the system and ‘get off’ lightly. The academic critique, however, is centred around literature which suggests that plea bargains create inducements to plead guilty which are incompatible with defendants’ due process rights.

The purpose of this empirical study has been to explore the causes of cracked trials in light of their relationship with plea bargaining, and to thereby explore the nature and extent of plea bargaining, which was defined as any guilty plea in which the defendant perceives that he receives some benefit or concessions from the prosecuting authorities or the state in exchange for his guilty plea. Having explored the nature of plea bargaining, the thesis puts forward a quantification of the prevalence of plea bargaining within the sample, and identifies four different types of plea bargain: sentence bargains as a result of the sentence discount; *Goodyear* indication sentence bargains, fact bargains, and charge bargains. The thesis then draws together the issues considered throughout, and the data analysed, in order firstly to propose an outline of the nature of plea bargaining as practiced in the Crown court; secondly to consider whether traditional conceptualisations of plea bargaining applied to the cases sampled; and thirdly, to consider whether alternative conceptualisations

of plea bargaining might be more fitting. The discussion below summarises what has been demonstrated by this thesis.

*The problem of the cracked trial (or, the problem of the cracked trial statistics)*

In 2006/2007, the Crown Court Annual Reports published by the Ministry for Justice recorded that 39% of all trials cracked. This thesis has highlighted inconsistencies and deficiencies within the administrative data, but more importantly has argued that the greater problem present the existing statistics on cracked trials is a definitional one and (as the results of this study show) the consequence thereof is a perception of the causes of cracked trials which is flawed and misleading. This thesis has put forward the argument that there is a need for a distinction between cases in which at least one individual count cracked (informal cracked cases), and trials in which each count on the indictment results in a cracked outcome (recorded cracked cases). The data showed that the number of informal cases is considerably greater than that of recorded cases (72.2% of the sample compared with 49.6% of the sample).

This finding is significant as it suggests that the ‘problem’ of the cracked trial is more wide-ranging than official statistics (based on recorded cracked trials) would indicate. From the point of view of the court administrator or policy maker, it highlights the fact that there are a great deal of cases which may not crack in their entirety, but could still cause a significant degree of wastage in terms of barristers’ trial preparation for charges which are never tried, overestimated court time which leaves a court room sitting idle when the case is disposed of early and unnecessary witness attendance, with the frustration and distress that can cause members of the public. Furthermore, irrespective of whether every count within a case cracks, each cracked count is worthy of consideration in its own right; explorations of what motivated a defendant to plead guilty at a late stage, or why the prosecution were unable to offer any evidence at the trial need not, and indeed should not, be confined to cases in which every count is disposed of by the same means.

The benefits of examining cases with respect to count outcomes and exploring informal cracked cases becomes all the more apparent in the context of this study’s analysis of the data extracted on the reasons for cracked trials. Existing administrative statistics for 2006 record that the reason for trials cracking in 64% of cracked (that is, formal) cases, was a result of the defendant entering guilty plea(s) to offence(s) originally on the indictment. In 18% of cracked cases the reason was recorded as being that the defendant entered guilty plea(s) to alternative offence(s), and in 16% of cases that the prosecution offered no

evidence (Judicial Statistics 2006). These statistics classify any case in which a defendant pleads guilty to an offence as a case which cracked as a result of that guilty plea, irrespective of the fact that other counts within the case may have been disposed of differently. It is argued in Chapter 5 that there is an incongruity in only defining cases as cracked if all counts crack on the one hand, and on the other, classifying a cracked case as being caused by the defendant if only one count of several cracks as a result of a defendant's late guilty plea. The data extracted for this study were analysed in a way which allowed for the causes of recorded cracked trials to be considered at the count, rather than trial, level and the result was a very different picture of the causes of cracked trials. Only 28% of cracked trials were caused solely by the defendant pleading guilty to charges originally on the indictment and 16% were caused solely by the defendant pleading guilty to alternative charges. The prosecution offering no evidence was the reason for the trial cracking in 28% of cases (considerably more than the 16% recorded by the Judicial Statistics) and a key finding is that 28% of cracked trials cracked as a result of a combination of reasons and ought therefore not be classified as a cracked trial caused by the defendant's guilty plea, as they would be by official statistics. There is no logic in defining a trial in which the prosecution offer no evidence to one count, leave another to lie on file, and the defendant pleads guilty to a reduced charge, as a cracked trial caused by a defendant's late guilty plea. Doing so merely perpetuates the perception that defendants plead guilty late in order to 'play the system' and secure greater benefits; a perception for which there is little evidence.

#### *The nature of plea bargaining in cracked trials*

One aim this thesis set out to achieve was to explore the nature of plea bargaining in cracked trials, and it has done this in several ways. It has firstly argued that any guilty plea which is entered by a defendant who perceives that he will benefit from his guilty plea is a plea bargain. In the UK, the well established principle of a defendant receiving a sentence discount for a plea of guilty ensures that the vast majority of guilty pleas (other than in those cases where a whole life tariff for murder is to be imposed) are entered in the expectation that some lenience will follow. In determining whether or not a plea bargain has occurred, it is irrelevant whether this is the sole motivation for the guilty plea, regardless of a defendant's other motives for pleading guilty, the sentence discount creates a situation in which he enters into a plea bargain by exchanging his right to trial for a reduced sentence. As 90 cases within the sample featured at least one guilty plea, there were 90 cases in which plea bargaining occurred in respect of at least one charge on the indictment, and this represented 59.6% of the total sample.

The data presented in Chapters 3 and 4, and the further analysis thereof in Chapter 5 explored the nature of plea bargaining in greater detail and discerned four types of plea bargain, each of which was a feature in the causes of cracked trials. The sentence discount operated in all cases in which there was at least one guilty plea, and was the only type of plea bargain present in 21 cases. In the remaining 69 cases, however, it was possible to identify additional forms of bargaining as having likely contributed to the cause of the cracked trial. *Goodyear* indications were given in fifteen cases, and are, it is argued, an explicit sentence bargain between the defendant and the judge. The formalisation of sentence indications has lent transparency and legitimacy to a practice which interviewees suggested had already been common practice. A formal, enforceable agreement with the judge that a defendant's sentence will not exceed a certain maximum will undoubtedly be an attractive proposition for many defendants, and within the cases sampled it appeared that the assurance of a *Goodyear* indication had, in each case, if not been the deciding factor, then at least contributed to, the defendant's subsequent decision to plead guilty.

Fact bargains were present in 17 cases within the sample, in the form of agreed bases of plea between the prosecution and defence, and it seems clear that an agreement whereby the defendant pleads guilty to an offence with a basis of plea which makes the guilty plea and the offence more agreeable to both the prosecution and defence, is a plea bargain and where its terms result in a late guilty plea, it causes the case to crack. Charge bargains were, however, the predominant form of bargain and were present in 57 cases. In Chapter 5, this thesis demonstrated that there were several case outcomes which were the functional equivalent of charge bargains in a 'classic' sense, in which one charge is expressly substituted for another on the indictment. Although these express charge bargains occurred in 29 cases, there were another 36 cases in which, it is submitted, charge bargains also took place. These were cases in which charges were not formally replaced, but in which the defendant pleaded guilty to at least one charge and no evidence was offered in respect of others. In 23 cases, the prosecution left charges to lie on file as well as, or instead of, offering no evidence. It was argued that this range of outcomes all equate to subtle variations of charge bargain; each share the final outcome that the defendant pleads guilty to lesser or fewer charges than were originally on the indictment.

It is possible, from the analysis of the different types of bargain which were found to be operating within the sample, to make some generalisations about the nature of plea bargaining, this thesis proposed an outline of the nature of plea bargaining in within the sample studied. In summary, plea bargaining is: (i) explicit, (ii) open to negotiation by both

the prosecution and the defence (with a degree of permissible ‘haggling’) and (iii), each of the four types of plea bargaining is enforceable to an extent. This notwithstanding, the fiction that cracked trials and plea bargaining are entirely different phenomena is maintained, to the detriment of the knowledge of both. Plea bargaining is a multi-faceted process which involves an array of decision making processes, and legal, organisational and personal factors. It played a role in almost two-thirds of the cases sampled for this study, and yet the government, despite prioritising the reduction of cracked trials, and beginning to engage with plea bargaining to a limited extent, has failed to take note of previous research demonstrating the link between plea bargaining and cracked trials.

### *Playing the system?*

An argument this thesis has put forward to explain the government’s reluctance to acknowledge plea bargaining’s pervasive effect on case dispositions is that there is a perception that plea bargaining, and even the sentence discount alone, provide an opportunity for defendants to ‘play the system’ and to escape the punishment they ‘deserve’. Throughout this thesis, the data analysis and arguments put forward have demonstrated that contrary to this widespread perception, there is little scope for defendants to play the system. As summarised above, the official statistics on cracked trials are misleading, but furthermore, examinations of the means by which defendants might be able to manipulate the system led to the conclusions that it would rarely be possible for defendants to deliberately use bargained for pleas to their advantage and thus crack trials. In those cases within the sample where it appeared that a defendant had benefitted from a late guilty plea, in the sense that he had pleaded guilty to a considerably less serious indictment than had initially been laid, or there was a lack of correspondence between the charge pleaded to and the alleged facts, this was due to weaknesses in the prosecution case, often a lack of witnesses, rather than a tactic employed by the defendant. Likewise, the sentence discount or *Goodyear* indication do not necessarily lend themselves to being exploited by manipulative defendants who withhold their guilty pleas; the very clear rationale of the graduated sentence discount is to reward *early* guilty pleas and *Goodyear* indications (which this study found were used only rarely) can be given in terms so broad as to not amount to a particularly good ‘deal’ for a defendant to have secured.

Although the defendant may not often be in a position to play the system, the defendant’s barrister is. A core aim of this study was to explore the role of the defence barrister in cracked trials and in Chapter 3, the thesis examined the issues affecting the defence

barrister's role in advising on (late) guilty pleas and coming to agreements with the prosecution. There have perhaps been changes in the working culture of lawyers since Baldwin and McConville found that barristers on occasion pressurised their clients to plead guilty to the extent that defendants felt 'terrorised', 'ordered', 'instructed', or 'forced' to plead guilty (1977, p.46). Tague's research (2006, 2007) suggests that barristers are wary of complaints from clients or of being sanctioned by solicitors, and some of this study's interviewees also stated that it was not in their interests to be seen to pressurise defendants. Nonetheless, there are strong incentives for defence barristers to favour guilty pleas over trials; the fee structure is extremely unpopular, fees at the criminal Bar have been in a state of flux for many years and in some situations at least it is in barristers' financial interests to 'crack' trials. The close working relationships at the Bar are conducive to negotiation and compromise with the prosecution, whereas the barrister's often very limited contact with the defendant makes it unlikely that he will have the means or the motive to mount a strong defence if he has formed the view that the defendant is guilty and that a plea bargain would serve the interests of all parties. Chapter 3 also put forward evidence from interviews that legal professionals' relationships with defendants was tainted by perceptions of defendants as flawed, disorganised, and on occasion manipulative, individuals, echoing some of the findings of McConville et al. (1994) in this respect. Defence and prosecution barristers have (as a result of its lack of acknowledgement) a relatively free reign to plea bargain and are thus those who are in a position to 'play the system' and negotiate the terms of plea agreements in order to encourage guilty pleas if it serves their competing interests of financial gain, workload management and cooperation with colleagues.

#### *Pressures to plead guilty?*

The possibility that defence barristers will advise their clients to plead guilty when it may not be in their clients' interests to do so is one source of pressure to plead guilty, documented by *Negotiated Justice* (1977) in particular, but the effect of a barrister's last minute advice has also been highlighted by Bottoms and McClean (1976) and Zander and Henderson (1993) among others. There were two cases within the sample in which there was written evidence that the defendant had felt himself to be pressurised into pleading guilty, although without interviewing defendants it is impossible to know whether these cases were rare exceptions or part of a wider phenomenon (it can not be assumed that defendants would always voice their dissatisfaction to the extent that there would be a record of the events surrounding the plea).

There are factors other than the barrister's advice which may create pressures to plead

guilty; the very existence of the inducement of the sentence discount could be said to place every defendant in a situation whereby going to trial and maintaining a not guilty plea carries with it the risk of a greater sentence and that this sentencing differential creates a pressure to plead guilty. Likewise, sentence indications and the possibility of fact or charge bargains can create yet more inducements to plead guilty. Whilst from a principled perspective, it is clear that these inducements potentially undermine the voluntariness of a defendant's plea, this study found limited empirical evidence that undue pressures to plead guilty caused the individual defendants whose cases were sampled, to plead guilty and crack trials. This could well be a result of the means by which data were collected; an understanding of the effects of these inducements requires defendants to be interviewed or surveyed, which was beyond the scope of this thesis. Furthermore, evidence of pressure *was* documented in Cases 41 and 91 and, as discussed above, interviews with legal professionals suggested that they felt some degree of pressure might be appropriate, albeit it not *undue* pressure. A comparison can be made here with *McKinnon v United States* [2008], in which it was stated that although the sentence discount could exert pressure on defendants to plead guilty, it would require an extremely large sentencing differential to be considered *unlawful* pressure. Some level of pressure therefore appears to be accepted and is indeed inevitable, as even in a system which offered no reward for guilty pleas defendants could feel under pressure to plead guilty in order to avoid the ordeal of a trial. The data gathered for this thesis also supported previous findings that the sentence discount may operate in a way which discriminates against ethnic minorities, Afro-Caribbeans in particular, who are less likely to engage with, and therefore benefit from, the bargaining process.

#### *Towards an alternative understanding of plea bargaining?*

As pressure to plead guilty was not an overt feature of the cases sampled, Chapter 5 also considered alternative approaches to plea bargaining. During data collection and analysis, it became apparent that the nature of bargaining as documented by this study, and the way in which it was described by interviewees, was at times akin to a consensual or contractual system. It was clear that cracked trials were rarely, if ever, caused by defendants exploiting the system of plea bargaining for their own gain, but nor was there a sense that defendants had been pressurised into plea agreements which ran counter to their interests. It was more often the defence (though not the defendant himself) than the prosecution which initiated offers, and there were many instances of counter-offers between prosecution and defence. Plea bargaining as an example of 'consensual justice', on a par with restorative justice or mediation, as Jung (1997) suggests, is however a somewhat unrealistic proposition; the

criminal justice system is inherently coercive and plea bargains do not represent a consensus, or agreement, between the defendant and the state or the prosecution as to the appropriate sanction. There may be consensus as to the 'right' outcome between opposing lawyers, engendered by the shared understandings of their working practices, as Nardulli, Flemming and Eisenstein (1985) found, but this shared understanding does not extend to the defendant (see more generally Blumberg 1967; Alschuler 1975; McConville and Mirsky 1995; Emmelman 1996).

A model premised on plea bargaining as a contractual exchange of concessions in which the defendant is viewed as an autonomous agent who has the right to 'sell' his entitlement to trial in an agreement regulated along contractual principles has a more obvious applicability than a consensual model, and Scott and Stuntz (1992a, 1992b) convincingly argue that it could provide for a more equitable system of plea bargaining if the process were to be conceived of along contractual, not rights based, lines. The problem will always remain though, that a defendant in a criminal case does not have the same freedom to contract as an individual contracting in the civil law; he has no choice but to enter into a contract (which may or may not be advantageous to him or her), or accept the risk of a conviction at trial, and the more severe penalty which would accompany it; highlighted by Vogel's conception of dualistic liberty in which the defendant is still constrained by his position, despite formally having choices (2007).

There is no one single model, perception or conceptualisation of plea bargaining which can be applied universally. As Feeley writes:

'Because it has come to explain so much, plea bargaining is in danger of explaining too little. Because the concept is so inclusive and refers to such a subtlety of practices, important differences, subtle variations, degrees of magnitude, and functional equivalents are in danger of being obscured. People plead guilty for a variety of reasons' (1979, p.199).

The process is expansive, varied, and nuanced but above all, its effect in a case will invariably be linked to the defendant's personal preferences and decision making processes, and whilst this thesis has been able to put forward evidence and propose conclusions as to the nature of plea bargaining, individuals' preferences necessarily mean that systemic models will not apply in all cases. It is nonetheless hoped that this thesis has been able to draw out some of the 'subtle variations, degrees of magnitude and functional equivalents'



(Feeley 1979, p.199, cited above) of plea bargaining in its sample, in a way which makes a contribution to the existing understanding of plea bargaining.

This thesis has shown that there is a pressing need for the use of plea bargaining to be reappraised in an open and honest fashion if the 'problem' of the cracked trial is to be dealt with effectively. This may not be synonymous with a reduction in cracked trials, it is possible that they are the inevitable result of equally inevitable last minute plea bargaining and that measures to reduce them are alternately futile, or would require increasing inducements to plead guilty *early* to such an extent that undue pressures would undoubtedly be brought to bear on defendants. Plea bargaining may well be unique in its position as a legal process which has come to dominate court dispositions, become effectively formalised by statute and case law, yet still not be acknowledged by policy. The recent introduction of the Attorney-General's proposals for a system of 'plea negotiation' in serious fraud trials suggests that plea 'bargaining' may slowly be coming into the open. If this is the case, increased transparency in plea bargaining is to be welcomed, and its pivotal role in cracked trials can be explored further.

However, given the predominantly crime control orientated policies pursued in recent years, it seems likely that defendants will continue to face increasing inducements to plead guilty, and to cooperate with the prosecution, in order to avoid suffering the penalties of invoking their basic rights to put the prosecution to proof. This is, in part, what successive governments have perceived a punitive electorate to demand, and it also allows efficiency driven targets which view trials as unnecessary expenditure to be met. Moreover, both the punitive and efficiency aims can be thinly masked behind policies which claim to rebalance the system in favour of victims, as set out by *Justice for All* (2002). Yet the resulting policies operate within system of widespread plea bargaining and cracked trials in which neither defendants, victims nor the state appear to benefit to any great degree. The criminal justice system is structured in such a way that defendants face multiple inducements to plead guilty, and funding cuts in legal aid which impact upon the quality of representation exacerbate the problem. By far the majority of the inducements come to the fore at a very late stage in the pre-trial process though, with the consequence that considerable resources have already been expended, and the pressures placed upon a defendant will have done little to reduce the inevitable uncertainty or distress which may be felt by witnesses and victims. The result of failing to engage fully with the role of plea bargaining is that the state is left with the 'problem' of the late cracked trial, the defendant's right to trial is negotiated away by lawyers, with few safeguards against coercion, victims are frustrated, and the

electorate read newspaper headlines about criminals getting off lightly as a result of secretive 'deals'. It seems evident that the introduction of plea bargaining in cases of serious fraud and other serious and organised crime needs to become a catalyst for a reappraisal of its role in the criminal justice system as a whole for any of these problems to be remedied.

## APPENDIX A

### Data Collection Form

CPS FILE

#### CASE / COURT DETAILS

<b>Minshull Street</b>		<b>Effective</b>		<b>Finalisation type</b>		<b>Finalisation detail</b>	
<b>Crown Square</b>		<b>Cracked</b>		C4		G2	
		<b>Ineffective</b>		C6		G3	
						G4	
						Undefined	

<b>URN</b>	
<b>CMS</b>	
<b>T</b>	
<b>CPS Unit</b>	
<b>Mags court</b>	
<b>Police Station</b>	

#### **Outcome**

Guilty plea	
Conviction after trial	
Jury acquittal	
Judge directed acquittal	
Indictment stayed	
Lie on file	
Discontinued	
Offered no evidence	

#### DEFENDANT / OFFENCE DATA

Name.....

DOB...../...../.....

Address:.....

M F

.....  
.....  
.....  
.....

#### **Ethnicity**

White European	
Dark European	
Afro-Caribbean	
Asian	

Arab	
Oriental	
Unknown	

#### **Indictment**

Count <sup>1</sup>	Initial Plea	Outcome <sup>2</sup>	Sentence
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			

<sup>1</sup> Original or amended? <sup>2</sup> Conviction after trial / Guilty Plea / Acquittal / Offered no evidence / Lie on file / Discontinued

### Facts of case

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### Chronology

Date of offence	
Date of arrest	
Date of charge	
Date listed for trial	
Date finalised	

### Bail status

Remanded in custody	
Conditional bail	
Unconditional bail	

### Employment [at time of offence]

Full-time employment	
Part-time employment	
Self-employed	
Unemployed	
Student	
Retired	
Unknown	

### PLEA CHANGE INFO (if applicable)

Cracked at pre-trial hearing	
Cracked first day of trial	
Cracked during trial [after which point?]	

### Sentence Indication

Was a sentence indication provided?	
Was a guilty plea entered as a result?	

### Circumstances of plea change

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### Written basis of plea?

YES	NO
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### Further details

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## LEGAL REPRESENTATION

Date	Hearing	Prosecuting Counsel	Defence Counsel

### Meetings with defence solicitor/counsel

.....  
.....  
.....  
.....

No details in file ☐

Defence solicitor.....

### Police station representation?

YES	NO
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### Interventions during police interviews?

YES	NO
-----	----

Legal Representative	
Solicitor	

### No Comment Interview?

YES	NO
-----	----

### Interview duration:

1.....2.....3.....

## PREVIOUS CONVICTIONS

Date first convicted.....

Total No. Previous ☐

Date last convicted.....

Offence type	Dates	Number	Plea
Theft & kindred offences			
Offences against person			
Offences against property			
Drugs			
Firearms/Offensive weapons			
Sexual			
Police/Courts/Prisons			
Public Disorder			
Driving			
Non-recordable			
Misc.			
Other:			

**PROSECUTION EVIDENCE**

<b>Evidence type</b>	<b>No.</b>
Expert witness statements	
Police witness statements	
Civilian witness statements	
Police witnesses to alleged incident	
Civilian witnesses to alleged incident	
DNA	
CCTV	
Fingerprints	
Identification	
Admissions	
Physical evidence recovered	
App. to adduce bad character evidence	
Other:	

**NATURE OF DEFENCE**

n/a ☐

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**COMMENTS**

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## APPENDIX B

### INTERVIEW SCHEDULES

The questions below provide an outline of the issues which were, where possible, addressed in each interview. The interviews were semi-structured and differed in length and nature, although all took the form of conversations (see Chapter 2 for further details of the methods used).

#### Court administrators

- How do cracked trials affect your work?
- To what extent do cracked trials present a problem for the court?
- Have measures been put in place to reduce the number of cracked trials, if so, have they been effective?
- What do you think are the main causes of cracked trials?
- What do you think are the main causes of cracked trials caused by late guilty pleas?
- In your experience, do any particular types of offences more often result in cracked trials?
- How great a role do you think lawyers (prosecution and defence) play in cracked trials? What is the nature of that role?
- Do you think that the [graduated] sentence discount / *Goodyear* indications have/will reduce the number of cracked trials?
- [If plea bargaining/negotiation mentioned by interviewee] Do you feel that plea bargaining creates pressure on defendants? / Allows defendants to 'get off lightly'?

#### Barristers and Solicitor

As above, with additional questions:

- What impact do you feel your advice has on defendants when they consider their plea?

#### Judges

As Court administrators, but with greater emphasis on the sentence discount and *Goodyear* indications.

## APPENDIX C

### **Methods not appropriate to this study: questionnaires, observation and focus groups.**

Questionnaires, participant observation and focus groups are three major methods with potential application in a study of this kind, but which were inappropriate for this particular study, either for practical or methodological reasons.

#### Questionnaires

There is some research on plea bargaining in the UK which has employed heavily structured questionnaires to collect data. Seifman's (1980) study comprised of two parts; the first of which consisted of standardised questionnaires administered to a random group of 200 convicted prisoners. The questionnaires asked about influences on plea and bargaining practices at various stages of case disposition. The second element of the research was interviews with the prisoners' lawyers regarding the process of plea formation, their influence upon the client's decision to plead, and opinions on plea bargaining in general. Structured questionnaires were also used by Zander and Henderson's Crown Court study (1994), carried out for 1993 Royal Commission on Criminal Justice. As such, it had vast scale and scope, and data from over 3500 cases was analysed; however, the study considered cracked trials only as a small part of what was researched and the discussion of cracked trials was limited primarily to the extent to which they waste resources, rather than their causes.<sup>151</sup>

Structured interviews or questionnaires, particularly if they make use of Likert-style attitude scales or other easily codifiable response options have some advantages over less structured methods in that the data is easy to manage, reliable and can be translated into clear statistics without difficulty. Standardised questionnaires or heavily structured interviews were however not suited to the aims of this study which, given the scarcity and inconsistency of previous findings, is largely exploratory in nature and seeks to consider a range of issues in depth rather than to present a large body of generalisable quantitative data.

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<sup>151</sup> Zander and Henderson have been criticised for taking a 'stubbornly atheoretical' approach with little attempt made at assessment or criticism (Baldwin 2000, p.241). The study's findings on cracked trial rates also suffered from a low response rate.



### Participant observation

Another approach which has previously been taken when researching courts and lawyers is to use observational methods. McCabe and Purves (1972) examined 90 cases involving a total of 112 defendants who were due to be tried but changed their plea to guilty at a late stage in the court proceedings. The authors do not explicitly outline their methods, but seem to have observed the court cases of their sample, as well as examining police and court documents. What appear to be informal conversations with police and lawyers on specific cases are also mentioned. Similar methods were employed by Bottoms and McClean (1976), who analysed five key decision-making stages of criminal cases – the first of these being plea, and combined interviews with their own observations of the court process. More recently, *Standing Accused* (McConville et al., 1994) observed the working practices of 22 firms of solicitors over a total period of three years.<sup>152</sup>

The benefit of using observational methods to research the causes and features of cracked trials would be that, if interactions between defendants and lawyers could be observed, it would be a very rich source of data, and one which would be unencumbered by participants' imperfect or one-sided recollections or records of events. Baldwin writes that 'no researcher got closer to what happens in pre-trial stages' than McConville et al in *Standing Accused* and that 'although direct observation of this kind is a time-consuming (and therefore expensive) exercise and one that is far from free from methodological problems of its own, the study nonetheless revealed much more about solicitor-client interactions that simply could not have been discovered by other methods' (Baldwin, 2000, p.248).

This notwithstanding, an observational study would not be suited to this piece of research. As Baldwin also points out, court observation can be 'deceptively straightforward' in the sense that, whilst sitting in a courtroom and observing events is, on the surface, a simple means of gathering data, it can be extremely time consuming and he refers to the 'lengthy periods of unrelenting tedium' it entails (2000, p. 245). Whilst avoiding unrelenting tedium is a concern, the more important consideration is that a doctoral thesis must be feasible within a relatively short timeframe and observational studies can require a great deal of investment in terms of time, particularly if all the work is being carried out by one novice researcher. There is no specific time at which plea discussions take place, and much of a lawyer's work (even once at court with the client) may be unrelated to plea; these other

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<sup>152</sup> An average of six and a half weeks were spent at each firm, and the researchers also carried out interviews and examined case files.

aspects would also have to be observed. By contrast, interviews or questionnaires make it possible to focus on the relevant issue throughout.

More significantly, court observation only allows the researcher to see the ‘public face of justice’ (Baldwin 2000, p. 245) and a vast range of significant decisions are taken outside formal court hearings. This is undoubtedly applicable to negotiated pleas or decisions to plead guilty which by their very nature are informal or personal respectively and do not take place in open court. Even if one leaves aside negotiated pleas and considers cracked trials more generally, the essence of a cracked trial is that, at the start of (usually) the first day listed for trial, the defendant expresses an intention to plead guilty; the focus of this study has therefore already ‘happened’ by the time the case gets inside a courtroom. Given that one aspect of this research is the nature of the legal advice given to defendants whose cases crack, then the rushed, almost ad-hoc meetings between counsel, the instructing solicitor and the defendant at the court building would not readily lend themselves to observation.

A related problem experienced by Bridges and Choongh (1998) whilst researching the impact of the accreditation scheme for police station legal advisors, was that some lawyers were concerned that the researchers would not be covered by professional privilege, meaning that private consultations observed between solicitor and client, if observed by a third party, could potentially be required to be disclosed in court. This indicates the heightened concerns both lawyers and their clients may have regarding confidentiality if they are to be observed at what, for defendants, is likely to be a stressful time. Bridges and Choongh (1998, p. 87) also highlight the difficulty in conducting an observational study in a way which leads to meaningful, generalisable results. They proposed a ‘checklist methodology’ to record occasions when legal advisors were observed to comply (or otherwise) with the relevant guidelines, but were aware of the limitations of this method in terms of its inflexibility in the sense that observations could only be recorded within the framework of the structured checklist; thus denying the method of some of its potential benefits. In the context of research into cracked trials and negotiated pleas, such a method would be inappropriate given the lack of guidelines with which actual conduct can be compared.

Overall, observation would have been an inappropriate method to use; the potential depth of the data which is its main advantage would be negated by the fact that it would be extremely difficult to observe the relevant interactions, particularly within the practical

constraints of a doctoral thesis.

### Focus groups

Though focus groups have not been used by any of the previous research, they could have potential benefits in a study of this kind as they are relatively inexpensive to conduct in comparison to conducting all the interviews individually, can often produce rich data, and have a flexible format. A significant disadvantage is that the results are often even less readily analysable than those of other unstructured methods. Group dynamics and the way the discussion progresses can result in there being few similarities between the structure of the group interviews, making it difficult to draw comparisons between groups; on a more practical level, it can be difficult to distinguish between participants' voices on recordings. Furthermore, the emerging group culture can override individual views and an inaccurate group consensus is a potential risk (Fontana and Frey 2000, p. 652). As only a relatively small number of interviews were carried out, and individual legal professionals' views are of no less interest than those views expressed in a group setting, focus groups would not have added anything significant to the study.

## APPENDIX D

### Court Service Data

In addition to the quantitative data recorded from case files, I obtained a data set containing raw data on 150,000 counts heard between 2002 and 2006 at Manchester Minshall Street, Manchester Crown Square, Liverpool, Leeds and Birmingham Crown courts compiled for me by the Court Service Information Management and Analysis Group. The data set contains detailed information about the recorded reason for the trial being cracked or ineffective, charges, pleas, whether these pleas were acceptable at the first, or a later offering, verdicts, and dates of each case, and whilst, unlike the CPS files, not having the benefit of contextual data, would potentially have been a very informative dataset to analyse statistically. Unfortunately, there were several structural hurdles to overcome within the dataset, in order to allow it to generate meaningful results about cracked trials. Despite months of attempts, exhausting the University of Manchester's SPSS support facilities, and enlisting the help of a statistician at the University, it was not feasible to overcome these technical issues within the timeframe of this study (indeed it is unclear whether or not the problems can be overcome at all). It is hoped that the dataset can be analysed at a later date, and could produce results to address the following types of questions:

- (i) Which types of case are more likely to crack:
  - with pleas of guilty to the original indictment;
  - with pleas of guilty to lesser or fewer charges;
  - as a result of the prosecution offering no evidence?
- (ii) Which types of cases are more likely to have offers of guilty pleas accepted by the prosecution the first time they are offered, and which are more likely to crack after the second time a guilty plea is offered?
- (iii) What is the extent of regional fluctuations in different types of cracked trial?
- (iv) What is the extent of seasonal fluctuations in different types of cracked trial?

The data collected from case files has produced some indications which are useful in exploring these questions, but quantitatively, the larger dataset would be able to generate more generalisable statistics. If this data can be analysed it would also be possible to make comparisons between the quantitative results of the case file dataset with that of this much

larger, but less contextual, dataset.

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